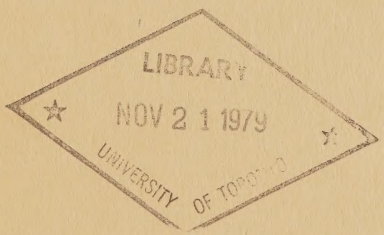
Ontario

Commission on Freedom of Information and Individual Privacy

Freedom of Information and the Administrative Process



Research Publication **10**

FREEDOM OF INFORMATION AND THE ADMINISTRATIVE PROCESS

by Larry M. Fox

with the assistance of
Marie Rounding Atkey

Research Publication 10

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Ontario

D. Carlton Williams, Ph.D.
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Consultant

Doris E. Wagg
Registrar

Commission
on
Freedom of Information
and
Individual Privacy

416/598-0411

180 Dundas Street West
22nd Floor
Toronto Ontario
M5G 1Z8

FOREWORD

The Commission on Freedom of Information and Individual Privacy was established by the government of Ontario in March, 1977, to "study and report to the Attorney General of Ontario on ways and means to improve the public information policies and relevant legislation and procedures of the government of Ontario, and to examine:

1. Public information practices of other jurisdictions in order to consider possible changes which are compatible with the parliamentary traditions of the government of Ontario and complementary to the mechanisms that presently exist for the protection of the rights of individuals;

2. The individual's right of access and appeal in relation to the use of government information;

3. The categories of government information which should be treated as confidential in order to protect the public interest;

4. The effectiveness of present procedures for the dissemination of government information to the public;

5. The protection of individual privacy and the right of recourse in regard to the use of government records."

To the best of our knowledge it is the only Commission of its kind whose mandate embraces both freedom of information and individual privacy. The views of the public were embodied in the briefs submitted and in the series of hearings held in ten communities, and covering both Northern and Southern Ontario. In response to public demand, three sets of hearings, widely separated in time, were held in Toronto.

The views of the scholars and experts in the field are to be found in the present series of research reports of which this is number 10. These, together with the briefs submitted, constitute the backbone of our findings: the stuff out of which our Report will be made. Many of these stand in their own right as documents of importance to this field of study; hence our decision to publish them immediately.

It is our confident expectation that they will be received by the interested public with the same interest and enthusiasm they generated in us. Many tackle problem areas never before explored in the context of freedom of information and individual privacy in Canada. Many turn up facts, acts, policies and procedures hitherto unknown to the general public.

In short, we feel that the Commission has done itself and the province a good turn by having these matters looked into and that we therefore have an obligation in the name of freedom of information to make them available to all who care to read them.

It goes without saying that the views expressed are those of the authors concerned; none of whom speak for the Commission.

D. C. Williams
Chairman

PREFACE

The subject matter of the present paper is a description and analysis of the information access practices of public officials and agencies who exercise what might be referred to as a "statutory power of decision." Although political systems based on the parliamentary or Westminster model emphasize the ultimate responsibility of our elected representatives for the decision-making processes of government, it is well known and commonly accepted that the legislature often confers a direct power to make decisions or recommendations on the holders of various public offices or on statutorily established administrative agencies or bodies.

The conferral of a statutory power to decide may be made for any one of a number of reasons. A critical consideration may be simply one of convenience; we do not, for example, expect the Minister of Community and Social Services to become involved in the disposition of each and every application for the payment of social assistance benefits. A conferral may be motivated by a desire to insulate particular decision-making processes from any appearance of being subject to the prevailing political winds of the moment. Or, there may be a desire to insulate the elected minister from acrimonious involvement in the multitude of particular administrative decisions that may be made in the course of implementing some statutory scheme. Further, it may be that a statutory power to decide is conferred on a particular agency in the hope that it will develop or will be staffed by individuals who possess considerable expertise with respect to the matter in question. Needless to say, all of these motivations and perhaps others may underlie the conferral of a particular decision-making power.

The institutional nature of the holder of the power may assume a variety of forms. The power may be given directly to a named official, such as the Registrar of Motor Vehicle Dealers and Salesmen, to be exercised personally. It may be conferred on a named official with power to delegate his authority to others. Or it may be conferred on a body such as the Ontario Highway Transport Board, which, acting as a collegial group, would exercise the decision-making power. Some bodies are established for the purpose of making decisions with respect to appeals from another decision-maker. Thus, an appeal from the decision of the Registrar of Motor Vehicle Dealers and Salesmen may be taken to the Commercial Registration Appeal Tribunal. The common thread in each instance, however, is that the individual or agency has been given by statute a power to make a decision.

In the course of making decisions, the decision-maker may be required to face difficult questions relating to the granting of access to information. Should interested parties have a right to see all documents in the possession of the decision-maker? Should access be given to documents that contain personal or commercial information relating to

others? Should access be given to staff reports or policy guidelines or manuals utilized by the decision-maker in question? Should the general public have access to any or all this material even though the individual requestor has no specific interest, pecuniary or otherwise, in the outcome of the decision in question?

There are a number of reasons for making this particular range of phenomena the subject of a special study by the Commission. Obviously, the exercise of statutory powers of decision represents an important and far-reaching area of governmental activity, and for that reason alone, is a proper subject of study. Further, the exercise of such powers is very likely to be a context in which the perceived public interest in access to information is very intense. One who does have an interest in the outcome of a particular decision may feel very keenly that he should have access to the information on which the decision-maker bases his conclusions.

Further, and most importantly, the courts of common law and the Ontario legislature have, in the past, given concrete expression to the notion that fair procedures, including access to certain kinds of information, must be followed by decision-makers whose decisions affect the rights of the individual. Thus, if a decision-maker is subject to the common law rules of "natural justice" or to the procedural requirements of the Ontario Statutory Powers Procedure Act, affected individuals will have a legal right to be apprised of the information on which the ultimate decision is based. It is important, then, to consider the level of access secured by these arrangements and to consider how they might intersect or conflict with a more general legislative scheme to secure citizen access to government documents. It is no doubt for this reason that the Commission's terms of reference instruct the Commission to consider changes which are "complementary to the mechanisms that presently exist for the protection of the rights of individuals."

The present study is designed to examine current practice in Ontario with respect to these questions across a broad range of decision-makers, and to examine the impact of legal mechanisms currently in place which secure some access to information by interested parties. Further, an attempt was to be made to identify the existence of problematic aspects of current practice and to determine whether they might be amenable to solution by the adoption of freedom of information laws.

The study was undertaken by Mr. Larry Fox, a member of the Ontario Bar, who has been a member of the research staff of this Commission for the last one and a half years. Mr. Fox was assisted during the summer of 1978 by Ms. Marie Rounding Atkey and Mr. Greg Turnbull. Ms. Rounding Atkey, also a member of the Ontario Bar, assisted Mr. Fox in the interviewing of various public officials and wrote preliminary drafts of Chapter IX and parts of Chapter V of this paper. Mr. Turnbull, a student at the Faculty of Law of the University of Toronto, provided legal research assistance.

Mr. Fox's paper is complementary to two other research papers undertaken for the Commission: Professor Ison's study of the Workmen's Compensation Board (Research Publication 4) and Professor Connelly's study on Securities Regulation (Research Publication 8). These latter studies examine the general problems considered by Mr. Fox in the context of the work of a specific agency, thus permitting a detailed examination of the particular agency's overall institutional design, its range of contacts with the various segments of the public which it serves, and a greater understanding of the public policy objectives which it has been designed to accomplish. Mr. Fox's study covers far too much ground to permit as sensitive a consideration of the particular problems of each agency. It does suggest, however, that the problems identified by Professors Ison and Connelly represent more general trends in the administrative processes of the Ontario government.

It should be pointed out that the interviews conducted by Mr. Fox and Ms. Rounding Atkey occurred during the late summer and early fall of 1978. Although some attempt has been made to bring the resulting descriptive accounts up to date, it is quite possible that the practices of a particular public official or agency have evolved from those described in this paper.

The Commission has resolved to make available to the public its background research papers in the hope that they might stimulate public discussion. Those who wish to communicate their views in writing to the Commission are invited to address their comments to: Registrar, Commission on Freedom of Information and Individual Privacy, 22nd Floor, 180 Dundas Street West, Toronto, Ontario M5G 1Z8.

It should be emphasized that the views expressed in this paper are those of the author, and that they deal with questions on which the Commission has not yet reached a final conclusion.

Particulars of other research papers published to date by the Commission are to be found on pages 270-271.

John D. McCamus
Director of Research

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CHAPTER I

INTRODUCTION

The purpose of this paper is to explore the freedom of information issue in the context of the administrative process. The term "the administrative process" refers to the decision-making activities of persons and administrative bodies given the power and responsibility to make decisions by statute. Decisions may be rendered by an administrative tribunal, commission or board after a hearing; or they may be made without a formal hearing by an individual civil servant who is an employee within a ministry of the Ontario government. They range along a continuum of public significance. Many simple decisions, such as individual welfare determinations, have negligible direct impact on the public. Others concern matters having a wide effect on the public, such as gas rates or the pricing of agricultural products.

Advocates of freedom of information in Ontario and elsewhere[1] contend that public access to government information is essential to meaningful

1 Legislation has been passed in the United States, Sweden, Denmark, Norway, New Brunswick and Nova Scotia. A Freedom of Information Bill is currently under consideration by the Australian Parliament. The issue has been the subject of extensive study and some controversy in the United Kingdom as well. See generally D.C. Rowat, Public Access to Government Documents: A Comparative Perspective (Research Publication 3, Commission on Freedom of Information and Individual Privacy, 1979).

democracy. Without it, political accountability is illusory. A citizen cannot evaluate government conduct without knowledge of the information on which decisions are based. What government action has been taken may itself be unknown. It is for this reason that the principle of improved access to information has received general endorsement, although considerable controversy has ensued about the most desirable means to implement it. The relationship between political accountability and public access to information has been succinctly described in the Federal Green Paper:

> Open government is the basis of democracy. It is an essential consequence of the extension of the franchise to all adult citizens. For a democratic society is one in which the exercise of governmental power is undertaken not by an elite according to its own precepts, but by an executive accountable to the public itself for the goals of government action and the effectiveness of government performance in their achievement.
>
> Democratic government must be government acceptable to the collectivity of citizens. To ensure that it is acceptable, there must be a political system to establish that government is accountable. Effective accountability -- the public's judgment of the choices taken by government -- depends on knowing the information and options available to the decision-makers. Assessment of government depends upon a full understanding of the context within which decisions are made. 2

Other reasons may be advanced in support of increased disclosure of government information. The Ontario government possesses much information in which the members of the public would have a direct or personal interest. Information concerning public health and safety

2 Hon. John Roberts, Secretary of State, Legislation on Public Access to Government Documents, (Ottawa: Ministry of Supply and Services, 1977) at 1.

contained in government inspection reports and research studies would certainly have this character. As consumers, the public has an acute interest in the disclosure of government information about the quality of goods and services.

Despite widespread agreement that increased public access to government information is desirable, there is nonetheless a recognition that not all information should be subject to unrestricted public scrutiny. Public interest in disclosure is sometimes confronted by opposing interests promoting confidentiality. The Ontario government has custody of intimate personal information about many thousands of people, the unfettered release of which would violate the personal privacy of those individuals. Vast quantities of business or financial information about individuals and corporations is collected in the course of regulating commercial activity. Its disclosure may compromise business privacy, possibly causing competitive detriment to the person or enterprise that is the subject of the information. The public interest in efficient government demands an assessment of the possible impact of information reform on the government's ability to fulfil its responsibilities to the people of Ontario. If effective law enforcement or policy-making may be impeded by public access to certain information, disclosure may have to be curtailed.

Even this cursory identification of the conflicting interests at the core of the freedom of information question illustrates the difficulty of the issue. Its resolution depends on a legislative scheme or administrative reforms that can effectively reconcile them.

Why should the administrative process, and particularly boards and tribunals be the subject of a separate study? Two reasons may be suggested. First, there are questions of accountability which are unique to this process. The present relationship between the various administrative boards and tribunals and the ministries to which they are linked is vague and uncertain. How they should fit into a Westminster-style government with its emphasis on ministerial responsibility, is equally unclear. The traditional view states that the tribunal should be independent in "day-to-day" operations, and the ministry should set the overall policy guiding the tribunal. Although this distinction is certainly capable of expression, it may be difficult to recognize in practice. The line demarcating an area of daily operations from matters of general policy is often obscure and may be fictitious.

Consequently, there is a difficult problem of political accountability in relation to administrative tribunals.[3] The present confusion

3 This issue has been discussed in several government studies and academic articles. Ont., Committee on Government Productivity, Report Number Nine (Toronto, 1973) at 24-76; Management Policy Division, Management Board Secretariat, Agencies, Boards and Commissions in the Government of Ontario (Toronto, 1974) at 28-53; F.F. Schindeler, Responsible Government in Ontario (Toronto: University of Toronto Press, 1969) at 69-80; P. Silcox, "The Proliferation of Boards and Commissions" in T. Lloyd and J. McLeod, eds., Proposals for Creative Politics (Toronto: University of Toronto Press, 1968) at 115-134; P. Silcox, "The ABC's of Ontario: Provincial Agencies, Boards and Commissions" in D. MacDonald, ed., Government and Politics of Ontario (Toronto: MacMillan, 1975) at 135-152; J.E. Hodgetts, The Canadian Public Service (Toronto:

(cont'd)

accentuates the need to improve public comprehension of this particular section of government, particularly in view of the important decisions made by many tribunals.

When decisions are made by civil servants who are part of a ministry and not members of discrete boards and tribunals, political responsibility is clear. Formal political accountability for their actions rests on the responsible minister. There is, however, the same question of openness described earlier. Without information about the activities of his subordinates, the minister is responsible in name only.

A second reason to examine boards, tribunals and other decision-makers separately is that in this context there is an acute interest favouring access that is not present elsewhere. The interest is that of the

3 (cont'd) University of Toronto Press, 1973) at 41-51; R. Schultz, "Regulatory Agencies and the Canadian Political System" in K. Kernaghan, ed., in Public Administration in Canada (3d ed. Toronto: Methuen, 1977) at 333-343; H.N. Janisch, "The Role of the Independent Regulatory Agency in Canada" (1978), 27 U.N.B.L.J. 83; H.N. Janisch, "Political Accountability for Administrative Tribunals". A paper presented to the Conference on Administrative Justice. Ottawa, 1978; H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of the Independent Regulatory Agency in Canada" (1979), 17 Osgoode Hall L.J. 46. Also see Geoffrey Stevens, "The Right to Seek Redress", Globe and Mail, Feb. 1, 1979 and "Deregulation", Globe and Mail, Feb. 2, 1979.

There is a movement within the government to establish memoranda of understanding between "the parent ministry" and its boards and tribunals to clarify the relationship between them. The memoranda will be tabled in the Legislature. Ont., Leg. Ass., Report of the Standing Procedural Affairs Committee on Agencies, Boards and Commissions (Toronto, 1978) at 10-11.

person affected by a determination of a decision-maker. Such a person would be most anxious to be apprised of the policies and procedures to which he is subject, and the information to be considered in the disposition of his application or case. In this context, the access issue becomes a question of the fairness of procedures followed in the determination of rights and liabilities of the individual.

Therefore a consideration of freedom of information in the context of the administrative process should have a dual focus. It must look generally to the question of access to information in possession of administrative decision-makers. Secondly, it must consider the issue from the perspective of a person affected by a decision.

This dual focus will be employed in explaining the relevant Ontario law and in describing the information practices of administrative decision-makers. The paper will also discuss "secret law" affecting decisions determining individual rights but not available to the public, or even to persons subject to the decisions in which those policies are applied.

At this point, certain terms should be explained. The words "tribunal", "board" and "commission" are used interchangeably to refer to administrative bodies that have been created by statute and are not within a formal ministry structure. No significance attaches to the use of one or another of these terms in preference to another. The phrase "administrative decision-maker" refers to persons and administrative bodies entrusted with the statutory power of decision.

It includes both tribunals, such as the Commercial Registration Appeal Tribunal and the Ontario Milk Marketing Board, and persons responsible for decisions who are employees of a ministry, such as the Director of the Provincial Benefits Branch and the Registrar of Motor Vehicle Dealers.

The large number[4] of boards, tribunals and other decision-makers forced an early decision about which ones should be examined in the course of this study. A group was selected that made decisions of varying complexity involving different kinds of information in the hope that the full range of interests and problems relevant to the freedom of information question would emerge.

The following decision-makers were chosen:

- Registrar of Motor Vehicle Dealers and Salesmen,
  Business Practices Division,
  Ministry of Consumer and Commercial Relations
- Director, Provincial Benefits Branch,
  Ministry of Community and Social Services
- Director, Vocational Rehabilitation Services Branch,
  Ministry of Community and Social Services
- Director, Environmental Approvals Branch,
  Ministry of the Environment

4 A recent study has listed 292 boards, commissions, advisory bodies and other public institutions. Many of these are advisory, research and other bodies not responsible for decisions affecting individual rights and liabilities. B. Bresner et al., "Ontario's Agencies, Boards, Commissions, Advisory Bodies and Other Public Institutions: An Inventory (1977)" in Government Regulation (Toronto: Ontario Economic Council, 1978).

- Assessment Review Court
- Building Code Commission
- Commercial Registration Appeal Tribunal
- Criminal Injuries Compensation Board
- Environmental Appeal Board
- Environmental Assessment Board
- Social Assistance Review Board
- Land Compensation Board
- Milk Commission of Ontario
- Ontario Energy Board
- Ontario Highway Transport Board
- Ontario Milk Marketing Board

The research proceeded by interviews with the Chairmen of the boards and tribunals, the Directors and the Registrar. In the case of several boards, other personnel, including the Legal Counsel or the Executive Secretary, were consulted. Persons appearing before the boards, including lawyers and consumer associations, were also interviewed to solicit their views on the question of access for persons affected by decisions.

Certain procedures were followed to avoid inaccuracies caused by misinterpretation. After each interview, a summary of the interview was prepared and returned to the person interviewed for correction. Relevant sections of the final draft of the paper were also sent to some interviewees as a final check.

Given the limited number of decision-makers surveyed, one caveat should be expressed. The paper does not purport to present a definitive description of the current level of availability of information maintained by administrative boards and tribunals in Ontario. It is intended to provide a general picture, based on an examination of relatively few decision-makers.[5] Although an attempt has been made to select typical illustrations of the administrative process in action, these methodological constraints may result in a somewhat distorted perception of the total administrative reality. The conclusions drawn in the paper should be assessed by the reader with these inherent limitations in mind.

5 Comprehensive studies of two administrative boards were undertaken for the Commission. See M.Q. Connelly, Securities Regulation and Freedom of Information (Research Publication 8, Commission on Freedom of Information and Individual Privacy, 1979) and T.G. Ison, Information Access and the Workmen's Compensation Board (Research Publication 4, Commission on Freedom of Information and Individual Privacy, 1979).

A study of information issues at the federal level was undertaken by Professor Robert Franson for the Law Reform Commission of Canada. Professor Franson and the Law Reform Commission kindly allowed us to study a draft of his report, Disclosure of Information, Confidentiality and Administrative Tribunals, prior to publication.

CHAPTER II

THE LAW

A. Access by a Person Who is Not a Participant

There is no general right of access to information in the possession of an administrative board or tribunal by a person not in some way involved in a decision. A member of the public who is not participating in a proceeding before a tribunal is not entitled to obtain any information or documents, including information about its policies and procedures. The decision to disclose information is completely within the discretion of the board or agency in the absence of any statutory provision to the contrary.[6]

When the decision-maker from which access is sought is not an administrative board or agency but a civil servant within a ministry of the Ontario government, the position is similar. There is no general

6 Re McAuliffe and Metro Toronto Board of Police Commissioners (1976), 9 O.R. (2d) 583 at 589-592 (Div.Ct.). A newspaper reporter brought an application for an order in the nature of mandamus to force disclosure of internal bylaws governing the Metropolitan Toronto Police Force. The application was refused. Mr. Justice Goodman found that there was no common law duty on the Board to disclose its bylaws and minutes. The Board was created by a statute. Unless such a duty was imposed by that statute or another statute, the Board was free to choose its own disclosure policy.

right of access apart from that conferred by statute. The discretion to withhold information may be limited or removed, however, by a ministry policy to which the decision-maker must defer as an employee within that ministry.

The discretion to disclose information and documents has to a great extent been modified by legislation. Many statutes contain provisions that compel some manner of disclosure. Other statutes include prohibitions that effectively deny disclosure. The frequency of both kinds of provisions and their variety in form and effect do not permit a comprehensive analysis that can divine a rational scheme underlying their enactment. Only the more general trends can be distilled.

Various provisions inhibit or prevent the dissemination of information by administrative boards and agencies and other persons responsible for administrative decisions. The first and most generalized deterrant is the oath of secrecy[7] which must be taken by each civil servant before a salary may be paid to him.[8] The meaning and scope of the oath are unclear. It is expressed in language so vague and general that its literal interpretation would obstruct efficient administration, because it would prohibit civil servants from communicating with each other.

7 "... except as I may be legally required, I will not disclose or give to any person any information or document that comes to my knowledge or possession by reason of my being a civil servant, so help me God."

8 The Public Service Act, R.S.O. 1970, c. 386, s. 10(1).

Apart from stating that this result was certainly not intended, little more can be said with any degree of confidence. Since its introduction in 1947, the oath has not received judicial consideration, nor been the subject of commentary or analysis elsewhere. The taking of such an oath, however, is likely to have an inhibiting effect on the disclosure of information, especially in view of the confusion as to its effect and application.

All employees of the ministries are subject to the oath contained in The Public Service Act. Members of some administrative boards and agencies take the oath as well. The practice apparently varies, although employees of the boards, such as secretaries and clerks, generally do take it. In the context of labour relations, however, the province has adopted a different approach. By specific legislation, it has required members of the Ontario Public Service Labour Relations Tribunal,[9] the Ontario Labour Relations Board[10] and conciliation boards[11] appointed under The Labour Relations Act to swear an oath similar to that contained in The Public Service Act prior to the commencement of their duties.

9 The Crown Employees Collective Bargaining Act, 1972, S.O. 1972, c. 67, s. 36(9).

10 The Labour Relations Act, R.S.O. 1970, c. 232, s. 91(8).

11 Id., s. 23.

A second type of deterrent found in many statutes is a general secrecy provision prohibiting communication of information except in certain specified circumstances. Information may be disclosed if it is required in connection with the administration of the legislation or in any proceedings under the applicable act or regulations. It may be communicated by the person to his counsel. Information may also be revealed with the consent of the person to whom the information relates. This standard provision appears in a number of statutes governing commercial licensing and regulation and health disciplines.[12]

12 The Bailiffs Act, R.S.O. 1970, c. 38, s. 14a; The Collection Agencies Act, R.S.O. 1970, c. 71, s. 26b; The Consumer Protection Act, R.S.O. 1970, c. 82, s. 29a; The Consumer Reporting Act, 1973, S.O. 1973, c. 97, s. 18; The Liquor Licence Act, 1975, S.O. 1975, c. 40, s. 25(1); The Mortgage Brokers Act, R.S.O. 1970, c. 278, s. 25b(1); The Paperback and Periodical Distributors Act, 1971, S.O. 1971, c. 82, s. 12(1); The Pyramidic Sales Act, 1972, S.O. 1972, c. 57, s. 19(1); The Travel Industry Act, 1974, S.O. 1974, c. 115, s. 21(1); The Real Estate and Business Brokers Act, R.S.O. 1970, c. 401, s. 27b(1); The Upholstered and Stuffed Articles Act, R.S.O. 1970, c. 474, s. 9a; The Motor Vehicle Dealers Act, R.S.O. 1970, c. 495, s. 25b(1); The Denture Therapists Act, 1974, S.O. 1974, c. 34, s. 22(1); The Funeral Services Act, 1976, S.O. 1976, c. 83, s. 32(1); The Health Disciplines Act, 1974, S.O. 1974, c. 47, s. 41(1), s. 65(1), s. 111(1), s. 137(1).

Section 25b of The Motor Vehicle Dealers Act is an example of the general secrecy or nondisclosure provision:

> "Every person employed in the administration of this Act, including any person making an inquiry, inspection or an investigation under section 22, 23, 24, 25 or 25a, shall preserve secrecy in respect of all matters that come to his knowledge in the course of his duties, employment, inquiry, inspection or investigation and shall not communicate any such matters to any other person except,
> (a) as may be required in connection with the administration of this Act and the regulations or any proceedings under this Act or the regulations; or

(cont'd)

Under many commercial registration statutes, an applicant must provide information about his past employment history and the current financial structure and organization of the entity which will carry on business pursuant to the licence. This information would not be otherwise available to the public. The non-disclosure provision preserves its confidentiality. In order to ensure the financial responsibility of registrants, several of these statutes allow the appropriate registrar to compel a registrant to file a financial statement certified by a person licenced under The Public Accountancy Act.[13] When this power is conferred, it is accompanied by a confidentiality provision that prohibits inspection of the financial statement or disclosure of its contents except in the course of ordinary administration of the legislation.[14]

12 (cont'd)

(b) to his counsel; or

(c) with the consent of the person to whom the information relates.

(2) No person to whom subsection 1 applies shall be required to give testimony in any civil suit or proceeding with regard to information obtained by him in the course of his duties, employment, inquiry, inspection or investigation except in a proceeding under this Act or the regulations.

13 R.S.O. 1970, c. 373.

14 The Collection Agencies Act, s. 30; The Consumer Protection Act, s. 26; The Mortgage Brokers Act, s. 27; The Real Estate and Business Brokers Act, s. 32; The Travel Industry Act, 1974, s. 16; The Motor Vehicle Dealers Act, s. 29.

Secrecy provisions are included in several statutes affecting other areas, including commercial regulation,[15] energy,[16] and labour relations.[17]

A third general kind of provision applicable to a number of boards and tribunals stipulates that members and employees of the board need not give testimony in a court or other proceeding.[18] This extends the duty to preserve confidentiality to judicial and administrative hearings. In some cases, these provisions render persons incompetent to give testimony, in which case they are not legally capable of testifying. In other statutes, the provision states either that the members and employees are not compellable or that they cannot be required to give testimony. This means that they may testify if they choose to do so,

15 The Private Investigators and Security Guards Act, R.S.O. 1970, c. 362, s. 18; The Securities Act, R.S.O. 1970, c. 426, s. 24.

16 The Ontario Energy Board Act, R.S.O. 1970, c. 312, s. 55; The Energy Act, 1971, S.O. 1971, c. 44, s. 6.

17 The Workmen's Compensation Act, R.S.O. 1970, c. 505, s. 98(1); The Colleges Collective Bargaining Act, 1975, S.O. 1975, c. 74, s. 22; The Crown Employees Collective Bargaining Act, 1972, s. 49.

18 The Colleges Collective Bargaining Act, 1975, s. 58, s. 93; The Crown Employees Collective Bargaining Act, 1972, s. 47, s. 49(5); The Denture Therapists Act, 1974, s. 22(2); The Health Disciplines Act, 1974, s. 41(2), s. 65(2), s. 111(2), s. 137(2); The Labour Relations Act, s. 98, s. 100(5), s. 100(6); The Ontario Energy Board Act, s. 6; The Ontario Highway Transport Board Act, R.S.O. 1970, c. 316, s. 12(2); The Ontario Municipal Board Act, R.S.O. 1970, c. 323, s. 31; The Workmen's Compensation Act, s. 81a(1); The School Boards and Teachers Collective Negotiations Act, 1975, S.O. 1975, c. 72, s. 62, s. 82; The Environmental Assessment Act, 1975, S.O. 1975, c. 69, s. 21.

but cannot be forced to testify if they decide otherwise. The presence of such a provision assumes that the person has discretion to give testimony. If the member or employee is not otherwise bound by a mandatory non-disclosure or secrecy provision, this discretion clearly does exist. However, if the person is also subject to a non-disclosure or secrecy provision, the position is less clear. Many non-disclosure provisions apparently forbid communication in a judicial or administrative proceeding unrelated to the relevant act or regulations. Thus, persons who are subject to such a provision would not be able to testify and a discretion to disclose would not exist. This, however, would render the provision respecting non-compellability extraneous and redundant. Unless one assumes that persons bound by a non-disclosure provision nonetheless have a discretion to testify in a judicial or administrative proceeding, it is a provision devoid of meaning. In fact, several ministries do treat it in a discretionary manner.[19]

Many statutes impose various positive obligations to provide information on boards and agencies. Several require the tribunal to publish a summary of its decisions including the reasons.[20] Many boards and

19 Including the Ministry of Labour and the Ministry of Consumer and Commercial Relations.

20 The Ministry of Consumer and Commercial Relations Act, R.S.O. 1970, c. 113, s. 7(10); The Liquor Licence Act, 1975, s. 14(6); The Compensation for Victims of Crime Act, 1971, S.O. 1971, c. 51, s. 4; The Denture Therapists Act, 1974, O. Reg. 576/75, s. 53; O. Reg. 577/75, s. 25; O. Reg. 578/75, s. 22, s. 23; O. Reg. 585/75, s. 30; O. Reg. 579/75, s. 48.

tribunals must prepare an annual report of their past activities for the responsible minister, who must submit it to the Lieutenant Governor in Council (the provincial Cabinet) and finally lay the report before the Legislative Assembly.[21] At this point, the report becomes a public document.

Other matters are made public by legislation. The by-laws or rules of certain self-regulating professional organizations are available for public inspection at the offices of their respective governing bodies.[22] In the case of the Law Society of Upper Canada, its rules may also be viewed at the offices of the Ministry of the Attorney General. Several

21 The Alcoholism and Drug Addiction Research Foundation Act, R.S.O. 1970, c. 18, s. 17; The Algonquin Forestry Authority Act, 1974, S.O. 1974, c. 99, s. 17; The Colleges Collective Bargaining Act, 1975, s. 57(3); The Crop Insurance Act (Ontario), R.S.O. 1970, c. 98, s. 12; The Denture Therapists Act, 1974, s. 13(1); The Health Disciplines Act, 1974, s. 7(1); The Law Society Act, R.S.O. 1970, c. 238, s. 51c(6); The Liquor Control Act, 1975, S.O. 1975, c. 27, s. 7; The Niagara Parks Act, R.S.O. 1970, c. 298, s. 19; The Ontario Educational Communications Authority Act, R.S.O. 1970, c. 311, s. 12; The Ontario Energy Board Act, s. 9; The Ontario Food Terminal Act, R.S.O. 1970, c. 313, s. 9; The Ontario Highway Transport Board Act, s. 28; The Ontario Labour-Management Arbitration Commission Act, R.S.O. 1970, c. 320, s. 7; The Ontario Municipal Board Act, s. 100; The Ontario Northland Transportation Commission Act, R.S.O. 1970, c. 326, s. 41; The School Boards and Teachers Collective Negotiations Act, 1975, s. 61(3); The Workmen's Compensation Act, s. 81c.

22 The Denture Therapists Act, 1974, s. 24(2); The Funeral Services Act, 1976, s. 34(2); The Law Society Act, s. 54(3); The Health Disciplines Act, 1974, s. 26(2), s. 51(2), s. 75(2), s. 97(3).

statutes require the availability of orders,[23] tolls[24] and rates[25] approved or made by decision-makers. Under The Environmental Assessment Act, 1975, the Minister of the Environment must make available for public inspection all documents relating to the process of environmental approval -- the environmental assessment, any written submissions, a decision of the Environmental Assessment Board or the Minister and any other document forming part of the record. This extensive disclosure may be limited, however, by an order of the Minister where he is of the opinion that "... the desirability of avoiding the disclosure of the matters ... in the interest of any person affected or in the public interest outweighs the desirability of disclosing such matters to the public."[26] This provision explicitly confers a duty on the Minister to balance the competing interests in making the decision. It should be noted that it contemplates the existence of a public interest in confidentiality as well as a private interest.

There is another important context in which boards and tribunals must balance conflicting interests in deciding whether or not to disclose information to the public. The decision as to whether a hearing before

23 The Business Practices Act, 1974, S.O. 1974, c. 131, s. 5; The Securities Act, s. 20(2); The Ontario Highway Transport Board Act, s. 24(3); The Environmental Protection Act, 1971, S.O. 1971, c. 86, s. 19(4); The Pesticides Act, 1973, S.O. 1973, c. 25, s. 24(4).

24 The Public Commercial Vehicles Act, R.S.O. 1970, c. 375, s. 12k.

25 The Ontario Energy Board Act, s. 37a(10).

26 The Environmental Assessment Act, 1975, s. 31.

the particular board or tribunal will be held in camera or in public raises similar issues. To the extent that a hearing or part of a hearing is conducted in camera, members of the public are denied access to information considered by the board or tribunal. As a general rule, most boards and tribunals are subject to a strong statutory presumption in favour of public hearings. Section 9 of The Statutory Powers Procedure Act, 1971[27] provides that any hearing required by that Act must be open to the public unless certain specified matters may be disclosed, in which case the tribunal may hold the hearing in respect of those matters in camera. Thus, even if the exceptional circumstances exist, the tribunal nonetheless retains a discretion to conduct the hearing in public. Moreover, if it chooses to hold in camera proceedings, the entire hearing need not be in camera, but only that part of the hearing concerning those matters. There are two circumstances which will allow a tribunal to exercise its discretion to hold the hearing in camera. Firstly, the hearing may disclose matters involving public security. The second is more complex. The hearing may disclose "intimate financial or personal matters or other

27 S.O. 1971, c. 47.

9. (1) A hearing shall be open to the public except where the tribunal is of the opinion that,

(a) matters involving public security may be disclosed; or

(b) intimate financial or personal matters or other matters may be disclosed at the hearing of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public,

in which case the tribunal may hold the hearing concerning any such matters in camera.

matters of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof in the interests of any person affected or in the public interest outweighs the desirability of adhering to the principle that hearings be open to the public."

Thus, tribunals to which The Statutory Powers Procedure Act, 1971 applies will generally hold their hearings in public. Section 9 has also been incorporated by reference into a number of other Ontario statutes.[28] A similar provision governs proceedings of the Environmental Assessment Board during hearings held pursuant to The Ontario Water Resources Act,[29] The Environmental Protection Act, 1971, and The Environmental Assessment Act, 1975. The Criminal Injuries Compensation Board must conduct its hearings in public except where the Board is of the opinion that a public hearing would prejudice the trial of the person who caused the injury or

28 The Beach Protection Act, R.S.O. 1970, c. 40, s. 2b(3); The Charitable Institutions Act, R.S.O. 1970, c. 62, s. 9(3); The Children's Institutions Act, R.S.O. 1970, c. 66, s. 9(3); The Community Recreation Centres Act, 1974, S.O. 1974, c. 80, s. 11(3); The Day Nurseries Act, R.S.O. 1970, c. 104, s. 2c(3); The Dog Licensing and Livestock and Poultry Protection Act, R.S.O. 1970, c. 133, s. 19d(7); The Elderly Persons' Centres Act, R.S.O. 1970, c. 140, s. 8(3); The Game and Fish Act, R.S.O. 1970, c. 186, s. 36d(7); The Homes for Retarded Persons Act, R.S.O. 1970, c. 204, s. 10(3); The Lakes and Rivers Improvement Act, R.S.O. 1970, c. 223, s. 8b(6); The Mining Act, R.S.O. 1970, c. 274, s. 127a(5); The Ontario Heritage Act, 1974, S.O. 1974, c. 122, s. 29(11), s. 32(8), s. 33(10), s. 49(7), s. 52(10), s. 55(8), s. 58(7); The Ontario Highway Transport Board Act, s. 18a(1). Many of these provisions were amendments effected by The Civil Rights Statute Law Amendment Act, 1971, S.O. 1971, c. 50.

29 R.S.O. 1970, c. 332, s. 9a(10).

death, or it would not be in the interests of the victim, or the dependents of the victim of an alleged sexual offence.[30]

Exceptionally, however, there are a number of boards and tribunals that are subject to statutory provisions apparently creating a presumption in favour of in camera proceedings. The exact wording of each provision, however, must be carefully examined to ascertain its effect. A section that states only that a hearing shall be held in camera will be read subject to section 9 of The Statutory Powers Procedure Act, 1971 if the Act applies.[31] Thus, the general requirement of a public hearing will prevail over the intention expressed in the relevant statute to hold an in camera hearing. In order to avoid the application of The Statutory Powers Procedure Act, 1971, a provision must explicitly state that it is to apply notwithstanding The Statutory Powers Procedure Act, 1971 or that The Statutory Powers Procedure Act, 1971 does not apply. This approach has been adopted in several statutes.[32] Hearings

30 The Compensation for Victims of Crime Act, 1971, s. 12.

31 Re Thompson and Lambton County Board of Education [1972] 3 O.R. 889, 30 D.L.R. (3d) 32 (H.C.). Section 28(2) of The Schools Administration Act, R.S.O. 1970, c. 424 provided that all hearings of a Board of Reference shall be conducted in camera. The Court held that s. 9(1) of The Statutory Powers Procedure Act, 1971, prevails over s. 28(2) by virtue of s. 32 of The Statutory Powers Procedure Act, 1971, which provides that "unless it is expressly provided in any other Act that its provision ... apply notwithstanding anything in this Act, the provisions of this Act ... prevail over the provisions of such other Act".

32 The Denture Therapists Act, 1974, s. 18(4); The Ministry of Community and Social Services Act, R.S.O. 1970, c. 120, s. 7c(1); The Funeral Services Act, 1976, s. 21(4); The Health Disciplines (cont'd)

held by the Social Assistance Review Board pursuant to the various statutes under which it has jurisdiction are always in camera proceedings. Hearings of various discipline committees are to be generally held in camera unless the person whose conduct is being investigated requests that the hearing be conducted in public. In this case, the discipline committee nonetheless retains a discretion to conduct the proceedings in camera if matters involving public scrutiny may be disclosed or the possible disclosure of intimate financial or personal matters outweighs the desirability of holding the hearing in public.

Thus, the province has not created a coherent framework of public access by statute. A citizen anxious to determine his "right" to information or documents from a tribunal or other decision-maker must examine its enabling statute and other statutes controlling the exercise of its powers. If the statutes are silent, neither compelling nor forbidding public disclosure, any "right" of access will depend entirely on the policies of the particular decision-maker. Further, it should be observed that any such policy would be immune from judicial supervision and challenge.

32 (cont'd) Act, 1974, s. 12(4); The Crown Employees Collective Bargaining Act, 1972, s. 11(4); The Colleges Collective Bargaining Act, 1975, s. 47(8); The Hospital Labour Disputes Arbitration Act, R.S.O. 1970, c. 208, s. 11d; The Workmen's Compensation Act, s. 79(2).

B. Access to Information by a Participant in a Decision

1. Common Law Background

The question of access to information by a participant in an administrative decision has been considered by the courts in the context of their general concern that fair procedures are followed in the exercise of statutory powers of decision. Certain persons and administrative bodies possessing power to make decisions must conform to a concept of fairness referred to by the courts as "natural justice." There are two facets to natural justice. One is a rule against bias. This branch of natural justice is not of interest to this inquiry. The second half of natural justice comprises the procedural requirements that must be followed by a statutory decision-maker in making a decision. This concept is often expressed in the Latin maxim, "audi alteram partem,"[33] and will be subsequently referred to as "the rules of natural justice." The fundamental notion established by the rules of natural justice is the right to a "hearing," with the notion of hearing implying certain mandatory minimum procedures.

In order to determine whether and how the rules of natural justice apply to a given fact situation, two questions must be considered. When

33 "Hear the other side."

do the rules of natural justice apply to a decision-maker, or, to put the matter differently, when must a decision-maker grant a "hearing" to a party? The second question concerns the content of natural justice. Assuming that a person is entitled to a hearing or natural justice, what are the procedural requirements of that hearing?[34] In developing a body of law which responds to these two questions, courts have, in effect, determined the right of access to information by a person participating in a hearing.

The rules of natural justice do not constitute a permanent code of certain content. The extent and application of the various procedural requirements within the embrace of natural justice vary according to the circumstances of individual cases and the nature of the decision.[35] A court may apply one or more of the procedural requirements to the exercise of a statutory power of decision according to its judgment as to what is appropriate in the particular situation.

34 Ont., 1 First Report of the Royal Commission Inquiry into Civil Rights (McRuer Report) (Toronto: Queen's Printer, 1968) at 138.

35 Local Government Board v. Arlidge, [1915] A.C. 120 at 140 (H.L.); Ceylon University v. Fernando [1960] 1 W.L.R. 223 at 231-232 (P.C.); Ridge v. Baldwin [1964] A.C. 40 at 65, 85-86 (H.L.); Russell v. Norfolk (Duke of), [1949] 1 All E.R. 109 at 118 (C.A.); Pett v. Greyhound Racing Association Ltd. (No. 2), [1970] 1 Q.B. 46 at 63-66; Re Pergamon Press, [1971] Ch. 388 at 402-403 (C.A.); Wiseman v. Borneman, [1971] A.C. 297 at 368 (H.L.); S.A. de Smith, Judicial Review of Administrative Action (3rd ed., London: Stevens & Sons, 1973) at 141.

Several requirements have received judicial recognition as being generally necessary.[36] For the purposes of this study, it is important to consider the procedural requirements that relate to the question of access to information. Although the others are of interest and essential to a comprehensive understanding of natural justice, they will not be reviewed here.

A party must be made sufficiently aware of the allegations against him so that he may be able to answer them. He must be apprised of argument and evidence adverse to his interest that are presented to the decision-maker. If a person or body entrusted with a statutory power of decision considers such matters in the absence of a party, thereby denying him the opportunity to rebut them, this principle will be violated. Thus, a party to a proceeding before a decision-maker governed by the rules of natural justice should be given an opportunity to examine any documents or reports or other information which will be before that decision-maker. Failure to afford this right will be a breach of natural justice and grounds for quashing the decision. Numerous cases have recognized the obligation of a decision-maker subject to the rules of natural justice to provide information on this basis.[37] Exceptions

36 de Smith, supra note 35, at 171-89; H.W.R. Wade, Administrative Law (4th ed., Oxford: Clarendon, 1977) at 451-464; Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 137.

37 R. v. Westminster (City of) Assessment Committee, [1941] 1 K.B. 53; R. v. Architects' Registration Tribunal, [1945] 2 All E.R. 131 (K.B.); R. v. Milk Marketing Board, ex parte North (1934), 50 T.L.R. 559 (K.B.); R. v. Deputy Industrial Injuries Commissioner, ex parte

(cont'd)

to this trend have also been sanctioned by the courts. When the disclosure of a medical report or its contents might pose a danger to the party, psychological or otherwise, a tribunal may allow a representative to examine it.[38] Another exception arises when disclosure of the reports would be dangerous to the public interest, such as when it would impede law enforcement or reveal military secrets.[39] A claim of Crown privilege[40] may be invoked to avoid

37 (cont'd) Jones, [1962] 2 Q.B. 677; Kanda v. Government of the Federation of Malaya, [1962] A.C. 322 (P.C.); R. v. Milk Board, ex parte Tompkins, [1944] V.L.R. 187 (H.C.); R. v. Metropolitan Fair Rents Board, ex parte Canestra, [1961] V.R. 89 (S.C.); Low v. Earthquake Commission, [1959] N.Z.L.R. 1198 (S.C.); Re Fairfield Modern Dairy Limited and the Milk Control Board of Ontario, [1942] O.W.N. 579; R. v. Ontario Racing Commission, ex parte Taylor (1971), 13 D.L.R. (3d) 405, [1970] 3 O.R. 507 (H.C.) affirmed 15 D.L.R. (3d) 430; [1971] 1 O.R. 400 (C.A.); Re Bolan and City of Oshawa et al (1974), 4 O.R. (2d) 197 (H.C.); Knapman v. The Board of Health for the Township of Saltfleet, [1954] O.R. 360 (H.C.); Denton et al v. Auckland City et al, [1969] N.Z.L.R. 256 (S.C.); Blais v. Andras, [1973] F.C. 182 (C.A.); Re Downing and Graydon (1979), 21 O.R. (2d) 292 (C.A.).

38 R. v. Kent Police Authority, ex parte Godden, [1971] 2 Q.B. 662.

39 de Smith, supra note 35, at 180.

40 Crown privilege is a common law doctrine relating to the rules of evidence allowing the Crown to refuse to testify or produce documentary information in judicial proceedings on the ground that disclosure would be detrimental to the public interest. See S.I. Bushnell, "Crown Privilege" (1973), 51 Can. B. Rev. 551; S. Lederman, "The Crown's Right to Suppress Information Sought in the Litigation Process: The Elusive Public Interest" (1973), 8 U.B.C.L.R. 272; E. Koroway, "Confidentiality in the Law of Evidence" (1978), 16 Osgoode Hall L.J. 361; Ontario Law Reform Commission, Report on the Law of Evidence (Toronto: Ministry of the Attorney-General, 1976) at 221-233.

production of the information, in which case a party must nevertheless be made sufficiently aware of the case against him.[41]

The difficult and perplexing problem is to determine when a particular decision-maker must comply with the rules of natural justice. Despite extensive judicial discussion, no definitive test has been articulated. The area remains uncertain and confused.[42]

The traditional approach has been to classify administrative action as being either "judicial" or "quasi-judicial," in which case the rules of natural justice apply, or "administrative," in which case the rules do not. However, the distinction between "administrative" and "judicial" or "quasi-judicial" has stubbornly resisted clarification and remains one of the most elusive concepts in administrative law. The absence of guiding principles has rendered it very difficult to predict when the rules of natural justice will apply to a decision. As a result, judicial decisions in cases on this point often exhibit a circularity of reasoning.[43] Professor Wade has observed:

41 In Lazarov v. Secretary of State [1973] F.C. 927, 39 D.L.R. (3d) 738 (C.A.), the court held the audi alteram partem principle to apply but did not require the disclosure of the confidential reports, so long as the applicant was apprised of the allegations against him.

42 D.J. Mullan, "Fairness: The New Natural Justice" (1975), 25 U. Toronto L.J. 281 at 289.

43 Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 139; de Smith, supra note 35, at 67.

> [that the] argument goes round in a circle: natural justice must be observed where the function is judicial; and the function is called judicial where natural justice is required to be observed. 44

With so uncertain a doctrine performing so critical a role, many decision-makers will have difficulty in determining the extent to which they are subject to the rules of natural justice. Those whose decisions are quashed may feel that the court has manipulated the concepts to achieve the desired results.

An examination of the relevant Canadian case law indicates that Canadian courts have not been able to avoid the confusion endemic in this area of the law. They have adopted several analytical approaches, none of which has received authoritative recognition in preference to the others. Indeed, some cases appear to combine two or more approaches, with the effect of obscuring the distinction between them.

Until recent years, the dominant line of judicial reasoning asserted that a duty to act judicially and adhere to the rules of natural justice would be implied when the decision affects the rights of an individual and when the person or body has a "superadded" duty to act judicially.[45]

44 H.W.R. Wade, Administrative Law (3rd ed., Oxford: Clarendon, 1971) at 190.

45 R. v. Legislative Committee of the Church Assembly, [1928] 1 K.B. 411 at 415; Calgary Power Ltd. v. Copithorne, [1954] S.C.R. 24 at 30, 16 D.L.R. (2d) 241 at 247; Re Training Schools Advisory Board, [1972] 1 O.R. 14 at 18, 22 D.L.R. (3d) 129 at 133 (H.C.); Re B and Commission of Inquiry Re Department of Manpower and Immigration, [1975] F.C. 602 at 609, 60 D.L.R. (3d) 339 at 345 (F.C.T.D.); Howarth v. National Parole Board, [1976] 1 S.C.R. 453 at 474, 50 D.L.R. (3d) 349 at 353.

The effect of this analytical method has been to narrow the application of the rules of natural justice. It has been severely criticized as being inconsistent with basic principles enunciated in earlier cases.[46] A more liberal approach towards the distinction was adopted in Ridge v. Baldwin.[47] The House of Lords held that the duty to act judicially may be inferred from the nature and effect on an individual of the powers exercised by the decision-maker, without having to demonstrate a "superadded" duty to act judicially.

Later cases introduced yet another method of analyzing the problem. In Durayappah v. Fernando,[48] the Privy Council set out three factors that should be considered in determining whether the rules of natural justice should apply:

> These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. [49]

This approach does not rely on the judicial-administrative classification as a basis for determining the applicability of the audi alteram partem

46 de Smith, supra note 35, at 136-151; Wade, supra note 36, at 431-446, 530-537.

47 Supra note 35.

48 [1967] 2 A.C. 337 (P.C.).

49 Id. at 349.

principle. Whether it is a method completely distinct from the earlier approach cannot be answered with certainty. The Durayappah analysis has occasionally been used by Canadian judges as an aid in effecting a classification of function based on the judicial-administrative dichotomy.[50]

In short, no clear consensus about the guiding principles emerges from the extensive jurisprudence. Nor is it possible to compile an exhaustive classification of the cases or kinds of decisions to which the rules of natural justice apply. One can discern, however, that certain interests have been afforded procedural protection more readily by the courts than others. When the issue has been the revocation of a licence,[51] dismissal from an office or occupation,[52] or a threat to real or personal property,[53] the courts have tended to find that the rules of natural justice should apply. Where the decision-maker is

50 The court used this approach in Lazarov v. Secretary of State. In Re Cardinal and Board of Police Commissioners of the City of Cornwall (1973), 2 O.R. (2d) 183, 42 D.L.R. (3d) 323 (Div.Ct.), Divisional Court cited the Durayappah criteria as being useful considerations when deciding whether the rules or natural justice should apply. However, it also classified the nature of the decision as being quasi-judicial.

51 Re Watt and Registrar of Motor Vehicles (1957), 24 W.L.R. 371 (Man.); Re Pecsenye and Hamilton Police Commissioners Board, [1973] 1 O.R. 142 (H.C.).

52 Ridge v. Baldwin, supra note 35; Re Cardinal and Cornwall, supra note 50.

53 Cooper v. Wandsworth Board of Works (1863), 14 C.B.N.S. 180; Saltfleet Board of Health v. Knapman, [1956] S.C.R. 877; Re Birnamwood Investments and Mississauga (1973), 2 O.R. (2d) 421 (H.C.).

engaged in procedures similar to those of the courts or has a duty to decide conclusively a dispute analogous to a lis inter partes, a requirement of natural justice has been similarly recognized.[54] There are circumstances, however, when the courts have generally decided the reverse. If the function of a tribunal is advisory, investigatory or recommendatory, or is part of a decision-making process in which its action will not have a final effect, the audi alteram partem principle is usually found not to apply.[55] The courts are reluctant to require a hearing for a decision which is to be governed primarily by considerations of policy, rather than by the application of established principles to the circumstances of individual cases.[56]

Recent cases[57] have introduced yet another approach to the question of fair procedures. They have imposed an obligation of "fairness" on

54 de Smith, supra note 35, at 156.

55 Roper v. Executive Committee, Royal Victoria Hospital (1974), 50 D.L.R. (3d) 725 (S.C.C.); Guay v. Lafleur, [1965] S.C.R. 12; R. v. Board of Broadcast Governors, ex parte Swift Current, [1962] O.R. 657 (C.A.); Re David and City of Welland (1973) 2 O.R. (2d) 679 (Div.Ct.); Re Nanticoke Ratepayers Association and Environmental Assessment Board (1978), 19 O.R. (2d) 7, 83 D.L.R. (3d) 722 (H.C.).

56 Calgary Power Ltd. v. Copithorne, supra note 45; Walter v. Essex County Board of Education, [1971] 3 O.R. 346 (H.C.).

57 Re K, [1967] 2 A.C. 617; Re Permagon Press, supra note 35; R. v. Gaming Board, ex parte Benaim and Khaida, [1970] 2 Q.B. 417; Selvarajan v. Race Relations Board, [1976] 1 All E.R. 13. Recent decisions have imported the "fairness" doctrine into Canada. See Re Nicholson and Haldimand-Norfolk Regional Board of Police Commissioners (1979), 88 D.L.R. (3d) 671, 23 N.R. 410; Coopers and Lybrand v. M.N.R. (1978), 24 N.R. 163 (S.C.C.); Re Scott and Rent Review Commission (1978), 81 D.L.R. (3d) 530 (N.S.S.C., App. Div.); Re Alberta Classification Appeal Board (1977), 81 D.L.R. (3d) 184 (Alta. S.C., T.D.).

certain decision-makers whose activities would have been considered as administrative using the traditional judicial-administrative classification. Thus, activities that in the past would have been unencumbered by mandatory procedures may now be subject to certain requirements.

The concept of fairness is a novel one of uncertain content and meaning. Important questions about its exact nature await answers from the courts. Whether it is a different standard of procedural protection than natural justice or is just a facet of natural justice is unclear. What specific procedures are implied by the concept is equally uncertain.[58] Despite present confusion, the fairness approach is of interest to this study because courts have relied on it in the context of a request for information by a person affected by administrative action.[59] In each case the court balanced competing interests. The party seeking the information argued that its disclosure was necessary so that he could fully present his case. Opposed to this was the interest of the decision-maker in preserving the confidentiality of informants whose

58 Mullan, supra note 42, at 288; de Smith, supra note 35, at 208. For a recent discussion, see M. Loughlin, "Procedural Fairness: A Study of the Crisis in Administrative Law Theory" (1978) 28 U. Toronto L.J. 215.

59 R. v. Gaming Board, supra note 57; Re Permagon Press, supra note 35; Lazarov v. Secretary of State, supra note 41. In Lazarov, the court both relied on the Gaming Board case and applied Durayappah v. Fernando, holding that audi alteram partem applied to the decision. Also see a recent decision Abel et al. v. Advisory Review Board (Div.Ct., February 16, 1979, unreported).

cooperation was believed essential to the effective performance of its duty. The courts held that although a party did not have a right to receive or examine the documents or transcripts relied on for the decision, he must be sufficiently apprised of the substance of the case against him so that he could answer allegations against his interest.

2. Statutory Changes

The principles that have been discussed thus far have been modified in Ontario by statute. In 1971, as a consequence of a comprehensive study of the administrative process by the Royal Commission Inquiry into Civil Rights (McRuer Commission), The Statutory Powers Procedure Act, 1971, was enacted. Part I of the Act establishes a minimum code of procedure for the proceedings of certain tribunals, setting out procedural rules that must be followed in the conduct of hearings. Although The Statutory Powers Procedure Act, 1971 clarifies the obligations of tribunals to a great extent, it does not completely resolve the difficult question as to when the statutory rules are to apply. Section 3 provides that the procedural rules apply to "proceedings by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold ... a hearing." To the extent that the enabling statute of a tribunal or other decision-maker states that a hearing is required, the procedural rules established in The Statutory Powers Procedure Act, 1971

clearly apply. However, if a hearing is not required by statute, one must seek guidance in the confusing mass of jurisprudence governing the applicability of the rules of natural justice. The phrase "or otherwise by law" was a transitional provision incorporated in the Act pending further examination and amendment of the Ontario statutes. It was intended to cause the minimum rules to apply to tribunals established under statutes that did not expressly require a hearing, but were nonetheless subject to the rules of natural justice according to the common law.[60]

Various procedural rules are set out in part I of The Statutory Powers Procedure Act, 1971. The provision regarding public and in camera proceedings has already been discussed. There is no rule, however, equivalent to the common law rule requiring disclosure of documents and other information by an administrative body to a party appearing before it. Section 8 most closely approximates it.

> 8. Where the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations thereto.

Although this provision compels the disclosure of "reasonable information of any allegations", it does not demand either the

60 D.W. Mundell, Manual of Practice on Administrative Law and Practice in Ontario (Toronto: Department of Justice and Attorney-General, 1972) at 4-5. After the enactment of The Statutory Powers Procedure Act, 1971, many statutes were reviewed. The Civil Rights Statute Law Amendment Act, 1971, S.O. 1971, c. 50 enacted amendments to 91 statutes, including provisions that required various decision-makers to hold hearings.

disclosure of all information that may be considered or documents or reports in the possession of a tribunal. Section 8 does not appear to require the production of documents.[61] This can be inferred from the inclusion of a standard pre-hearing disclosure provision in many statutes,[62] which generally provides that a party "shall be afforded an opportunity to examine before the hearing any written or documentary evidence that will be produced or any report the contents of which will be given at the hearing." Had section 8 been intended to compel the disclosure of documents, such a provision would have been unnecessary. The pre-hearing disclosure provision grants access to documentary information that will be adduced at a hearing. It does not extend to information in the possession of the government or an administrative body that will not be presented at the hearing.

The failure of The Statutory Powers Procedure Act, 1971 to set forth an explicit provision compelling the disclosure of information to an affected party does not mean there is no right of access. Part I of the Act is only a minimum code of procedure and does not derogate from common law rights that were extant prior to its enactment.[63] Thus, a

61 Re Kellar and College of Physicians and Surgeons (1977), 17 O.R. (2d) 516 at 518 (Div.Ct.).

62 The Civil Rights Statute Law Amendment Act, 1971 incorporated the standard pre-hearing disclosure provision into 20 statutes. Statutes enacted subsequently often include the provision as well. The provision is incorporated into approximately 37 statutes.

63 In Re Hershoran and Windsor (1974), 1 O.R. (2d) 291, Mr. Justice Hughes stated that "the word 'minimum' used in connection with the rules provided under Part I, is significant as evidence of an

(cont'd)

tribunal or other decision-maker to which the common law rules of natural justice apply should afford a party an opportunity to examine any documentary or other evidence that will be considered at the hearing. If a party is not able to rely on a pre-hearing disclosure provision, this principle will allow him access to relevant information at the hearing.

Courts have considered the question of access by a participant in the context of statutes which expressly provide for a hearing. Generally they have held the requirement of a hearing to include an obligation to provide each party with the information possessed by the administrative body. Otherwise, it is said, the right to a hearing will be meaningless.[64] The approach of the Federal Court of Appeal in considering this issue in the Re Magnasonic and Anti-Dumping Tribunal case is particularly interesting because the relevant statute[65]

63 (cont'd) intention not to deprive subjects of any residual rights that they have had under existing law". See Mundell, supra note 60 at 23-24; 1 C.E.D. (Ont. 3rd) at 3-88. A recent decision of the Ontario Court of Appeal has endorsed this view. See Re Downing and Graydon (1979), 21 O.R. (2d) 298 at 296, 308-309 (C.A.).

64 Re Magnasonic and Anti-Dumping Tribunal, [1972] 2 F.C. 1239, (1972), 30 D.L.R. (3d) 118 (C.A.); Re C.A.C. and C.R.T.C., ex parte London Cable TV, [1976] 2 F.C. 621 (C.A.). However, in Seafarer's International Union v. C.N.R., [1976] 2 F.C. 369 (C.A.), the Federal Court of Appeal held that the obligation to provide information did not apply in the context of a hearing which was part of an investigative function, when the party seeking access had a statutory right to object only. The Magnasonic case was distinguished. The Magnasonic case has recently been followed. See Sarco Canada Ltd. v. Anti-Dumping Tribunal (1978), 22 N.R. 225 (F.C.A.).

65 Anti-Dumping Act, R.S.C. 1970, c. A-15.

included a provision respecting the confidentiality of business information. The Anti-Dumping Tribunal was under a statutory duty[66] to prevent disclosure of confidential evidence or information to a business competitor or rival of a person, firm or corporation to which the information related. Notwithstanding this provision, the Federal Court of Appeal held that the Tribunal was under an obligation to allow a party access to any information contrary to its interest so that it could make submissions in response. The Tribunal was instructed to establish procedures that would afford this right as much as possible and still preserve the confidentiality of evidence and information. The procedures to be adopted would depend on the circumstances. This case is significant for two reasons. In confronting the question of access, the court explicitly recognized that its resolution depended on a reconciliation of competing interests. Secondly, the court did offer some tentative suggestions as to procedural mechanisms that might accommodate both interests. Evidence may be taken in camera. The rival parties may have to be excluded from the hearing room while evidence is taken and later be provided with a report or summary of the evidence taken in their absence.

A failure to grant access to information to a party by a tribunal may constitute a violation of the rules of natural justice. If so, it will be treated as a defect affecting the jurisdiction of the tribunal,

66 Id., s. 29(3).

rendering its decision void. A privative clause in the relevant legislation will ordinarily be ineffective to exclude judicial review.[67]

The rather arcane mechanisms available at common law to one who sought to overturn such a decision have been substantially simplified by The Judicial Review Procedure Act, 1971. An aggrieved person must apply to the Divisional Court by the simple device of an originating notice of motion. The Court may grant relief corresponding to that formerly available under the common law prerogative writ of certiorari, which could include setting aside the decision of the tribunal.[68]

67 R.F. Reid, Administrative Law and Practice (Toronto: Butterworths, 1971) at 187; de Smith, supra note 35, at 209; Re Liquor Control Board of Ontario and Keupfer (1975), 4 O.R. (2d) 138 at 144 (Div.Ct.); Re Seven-Eleven Taxi Co. Ltd. and City of Brampton et al (1976) 10 O.R. (2d) 677 at 682 (Div.Ct.).

68 S.O. 1971, c. 48. For a recent discussion of judicial review, see J.M. Evans, "Judicial Review in Ontario -- Recent Developments in the Remedies -- Some Problems of Pouring Old Wines into New Bottles" (1977), 55 Can. B. Rev. 148.

CHAPTER III

PRACTICES: A GENERAL OVERVIEW

A. Introduction

Chapter II indicated that the province of Ontario has not implemented a coherent statutory framework for public access to information. A patchwork of various statutory provisions has emerged, allowing administrative decision-makers considerable discretion to determine their own practices and policies. How this discretion has been exercised is the subject of this and subsequent chapters.

This chapter will discuss the practices of the decision-makers surveyed in a general manner. The discussion will have a dual emphasis, looking both to the question of access by members of the public generally and to the question of access by an individual affected by an administrative decision.

Before embarking on a description of the information practices and policies of administrative decision-makers, a brief and preliminary sketch of the legal and administrative contexts within which they operate will be attempted in order to place the following account in proper perspective.

Administrative tribunals and boards are creatures of statute and perform functions conferred on them by statute. Other administrative decision-makers that are not discrete boards or tribunals, but are part of a ministry, such as the Registrar of Motor Vehicle Dealers and Salesmen and the Director of the Provincial Benefits Branch, are similarly responsible for the fulfilment of statutory duties. The relevant statute is the source and limit of a particular decision-maker's jurisdiction and powers. Any information collected and maintained by an administrative decision-maker is related to the performance of its statutory function.

In Ontario, the government has chosen to confer a very limited function on many administrative boards and tribunals. Whether their responsibility is to determine a narrow issue having negligible public impact, such as an award of compensation to a victim of crime, or to decide complex questions of public significance, such as where a bus route should be located or whether the environment will be endangered by an industrial project, they generally fulfill their duty by a single means. They hold public hearings in which the parties present evidence to them on the basis of which a decision or recommendation will be made. With very few exceptions, the administrative boards and tribunals surveyed do not conduct research or otherwise collect information to facilitate the performance of their statutory responsibility. Nor do they employ research staff or consultants. When a hearing is held, they usually depend entirely on the parties to provide the necessary information, although the evidence and argument will be supplemented by the

collective experience and knowledge of the members presiding at the hearing.

That the activity of many boards and tribunals is so limited is surprising when one considers the complex matters for which they are responsible. The Ontario Highway Transport Board regulates the transportation of persons and goods for hire in Ontario. However, it does no research about the transportation industry or transportation needs in Ontario. The Environmental Assessment Board holds hearings pursuant to several statutes to assess the environmental impact of proposed factories, mines and other undertakings. In the course of hearings, the Board considers issues that may involve the presentation of highly specialized and technical evidence concerning the relevant hydrological factors, complex chemical processes, and the social impact on the local populace. Yet it conducts no research.

These comments are not intended as a criticism. They are intended only to demonstrate that many Ontario administrative boards and tribunals have been established for the single purpose of conducting hearings. As a general rule,[69] they do not engage in other aspects of regulation, such as investigation, policy-making, and research. These tasks are

69 This general trend may be changing. The Ontario Highway Transport Board will soon conduct public hearings on policy matters. Ministry of Transportation and Communications News Release, "OHTB to hold hearings on dump truck "R" licences", Jan. 19, 1979.

usually assigned to the appropriate ministry of the government.[70] Research into the highway transportation of people and commodities is undertaken by the Ministry of Transportation and Communications and not by the Ontario Highway Transport Board. Thus many administrative boards and agencies in Ontario differ significantly from independent regulatory agencies in the United States, such as the Securities and Exchange Commission and the Federal Trade Commission, and the major regulatory bodies established by the government of Canada, such as the Canadian Transport Commission and the National Energy Board. Whether this division of functions between ministry and administrative board is appropriate has been recently questioned with specific reference to the mandate of the Ontario Highway Transport Board.[71] The merits of this policy, however, do not concern this inquiry. Attention is drawn to it solely because it is crucial to an understanding of the information practices to be discussed in this paper.

The statement that apparently most boards and tribunals examined here do not engage in policy-making should be expanded upon. The phrase "policy-making" is used here in the sense of a tribunal or board establishing standards, criteria or rules independent of its function

70 It must be recalled that this study did not examine the Ontario Securities Commission, the Workmen's Compensation Board, the Ontario Labour Relations Board, the Ontario Municipal Board, and the Liquor Licence Board.

71 Ont., Leg. Ass., Final Report of the Select Committee on Highway Transportation of Goods, "A Public Policy Direction for the Highway Transportation of Goods (Toronto: Queen's Printer, 1977).

to conduct hearings for the purpose of making decisions or recommendations with respect to individual fact situations or "cases". The notion of policy-making thus connotes an express legislative function. In Ontario, the setting of formal standards, criteria and rules has been generally reserved to the enactment of statutes by the legislature and the promulgation of regulations under the formal authority of the Lieutenant Governor in Council (the provincial Cabinet). Yet, there are exceptions. Several administrative tribunals including agricultural marketing boards, some arbitration commissions, and the governing bodies of self-regulating professions, do possess the power[72] to make regulations, subject to the approval of the provincial Cabinet. Additionally, however, it should be noted that many administrative boards without such power engage in policy-making as part and parcel of their duty to make decisions and recommendations with respect to specific cases. In the course of decision-making, they develop general rules or policies, if only by following their own previous decisions in similar cases, in much the same manner as judges

72 The Milk Act, R.S.O. 1970, c. 273, s. 8; The Farm Products Marketing Act, R.S.O. 1970, c. 162, s. 8 (The Farm Products Marketing Board), s. 8(5), s. 15a (local boards); The Telephone Act, R.S.O. 1970, c. 457, s. 26 (Ontario Telephone Service Commission); The Denture Therapists Act, 1974, s. 23 (Governing Board of Denture Therapists); The Health Disciplines Act, 1974, s. 25 (dentistry), s. 50 (medicine), s. 74 (nursing), s. 96 (optometry), s. 122 (pharmacy); The Funeral Services Act, 1976, s. 33 (Board of Funeral Services); The Law Society Act, s. 55 (Convocation); The Drugless Practitioners Act, R.S.O. 1970, c. 137, s. 5, s. 6 (boards of directors); The Ontario Labour-Management Arbitration Commission Act, s. 9 (Ontario Labour-Management Arbitration Commission); The Police Act, R.S.O. 1970, c. 351, s. 39b (Ontario Police Arbitration Commission).

develop judicial policy or new law when they decide individual cases. This, then, is a second sense or meaning to the phrase "policy-making," and one not intended by the comment that boards do not undertake policy-making. In interpreting their respective legislative mandates in the context of individual decisions, policy is constantly being developed.[73]

In the case of decision-making powers conferred on a civil servant within a ministry rather than a board or tribunal, the preceding

73 Representatives of various boards and tribunals often express the view that policy is merely being applied by them, and that the policy has been set by the government in the legislation. Such a view obscures the reality of a tribunal seeking to interpret general or vague language, imposing its opinion of what interpretation of the legislation is most suitable in the context of the individual decision. The opportunity for choice created by the limits of language at least implicitly confers a policy responsibility on a tribunal.

A recent article has noted this problem of perception. See H.N. Janisch, "The Role of the Independent Regulatory Agency in Canada", (1978), 27 U.N.B.L.J. 83 at 91.

"An appreciation of perceptions rather than realities is of the greatest importance to an understanding of the regulatory process, as of the judicial process. In much the same way as common law judges have for centuries denied that they "made" new law but simply "discovered" existing law, so regulatory authorities and their creators always denied that they had anything to do with the making of policy. The policy to be applied was not that of the Board of Railway Commissioners, but that contained in the Railway Act ..."

"Almost fifty years later, the same perception prevailed. The Board of Transport Commissioners was not a policy-making body for '... the function of laying down policy is that of the government and parliament and not that of the Board of Transport Commissioners' 'The Board ... is set up to administer government policy, not to make it'."

comments apply in part only. Such persons do make decisions pursuant to statutory powers of decision. However, their duties as employees of a ministry may include participation in investigation research or policy-making.

The access issue involves several practical questions. Are files available to members of the public? Is the degree of availability different when the individual requesting access is affected by a decision? Are hearings of the tribunal or board held in public or in camera? Are the decisions published or otherwise available? Does the decision-maker provide explanatory information about its policies and procedures?

B. Files

Many of the boards and tribunals surveyed do grant access to their hearing record files. For some, this is the only file that they maintain. Section 20 of The Statutory Powers Procedure Act, 1971 requires tribunals to compile a record of any proceedings in which a hearing has been held.[74] It should include the various documents generated in the course of the hearing, from the document that initiates the process through to the document that marks its

74 The requirements of section 20 apply only to boards and tribunals that must comply with Part I of The Statutory Powers Procedure Act, 1971. Those not subject to the Act may adopt whatever policy they wish.

conclusion. Thus a typical file may contain the following: a document requesting the hearing, a notice of hearing, perhaps pleadings or similar documents, the exhibits adduced at the hearing, and a final decision or report that may include reasons.

A member of the public may examine the hearing record files of the Land Compensation Board, the Commercial Registration Appeal Tribunal, the Ontario Highway Transport Board, the Environmental Assessment Board, the Environmental Appeal Board, the Ontario Energy Board and the Building Code Commission. Generally the procedure for obtaining access is a simple and informal one. One need only attend at the offices of the board or tribunal and request to examine the file. Usually the file will be provided by a secretary, although requests to the Building Code Commission and Ontario Highway Transport Board are handled by the executive secretary of each. Both the Land Compensation Board and the Ontario Highway Transport Board require a person wishing to examine a file to complete a request form.

The grant of access means that a person may examine a file at the offices of the board, but may not remove it from the premises. In most cases, photocopying services are provided free of charge or at a minimal cost. The Ontario Highway Transport Board, however, levies fairly substantial fees for photocopying the content of its files, including the tariffs of tolls that must be made public pursuant to statute.[75]

75 The Public Commercial Vehicles Act, s. 12k.

The Land Compensation Board has no established practice and handles requests to photocopy files on a discretionary basis. Since there is no policy of charging for copies, the Board staff, concerned about excessive costs, generally denies requests for copies. Apparently, lawyers involved in cases before the Board are afforded preferential treatment and are provided with copies despite the general policy. The practices of both the Ontario Transport Board and the Land Compensation Board reduce the efficacy of the general policy of access.

Other practices affect the extent of access currently available. Certain tribunals permit parties to remove exhibits from the hearing record file after the expiry of the period during which a party may appeal its decision. To the extent that this is permitted, one who subsequently seeks access to the file is prevented from examining all materials on which the decision is based. This policy is followed by the Land Compensation Board, the Commercial Registration Appeal Tribunal and the Ontario Highway Transport Board. In cases where parties are entitled to the return of reports and other exhibits adduced by them at a hearing, it would be preferable to retain copies in the hearing record.

Finally, a practice of the Environmental Assessment Board may be noted as an example of the inadvertent effect of an otherwise laudable policy. The Board is very conscious of the increasing public interest in the environment, and has adopted a general policy of openness. During a hearing, the hearing record file is transferred to the site of the

hearing so that local residents may be fully apprised of the relevant issues. In view of the possible impact of the hearing on the populace, this is a sound and just practice. A conseqence of it, however, is that any person interested in the hearing must travel to that locality to peruse the documents.

Many Board hearings, such as the Elliot Lake uranium hearings,[76] involve issues of a magnitude and controversy that attract public interest extending beyond the bounds of the region most directly affected. It is not reasonable, however, to expect people to travel to Elliot Lake to consider the issues and examine the concomitant documentation. In order to accommodate concerned individuals, a second hearing record file could be maintained at the offices of the Board during all hearings, or at least during those obviously controversial or having a significant impact on the province.

Several of the decision-makers surveyed do not permit any access to their hearing record files or the equivalent file if they make decisions without a formal hearing. Among boards and tribunals, the Assessment Review Court, the Criminal Injuries Compensation Board, the Social Assistance Board of Review, the Milk Commission of Ontario and the Ontario Milk Marketing Board do not permit examination of their files. The Registrar of Motor Vehicle Dealers, the Vocational Rehabilitation

76 The Elliot Lake Uranium Mine Expansion Hearings are authorized by Orders-in-Council O.C. 2681/76 and O.C. 2992/76.

Services Branch and the Provincial Benefits Branch of the Ministry of Community and Social Services adhere to a similar policy of confidentiality.

The reasons for non-disclosure vary. The Registrar of Motor Vehicle Dealers is bound by a statutory non-disclosure provision that forbids communication of information.[77] A number of the other decision-makers -- the Provincial Benefits Branch, Vocational Rehabilitation Services Branch, Ontario Milk Marketing Board, Social Assistance Review Board, Criminal Injuries Compensation Board -- deny access because of the nature of the information. With the exception of the Ontario Milk Marketing Board and the Milk Commission of Ontario, each possesses personal information of a very intimate character. The policy of the Ontario Milk Marketing Board and the Milk Commission of Ontario follow from the financial character of some of the information collected from milk processors and producers.

The reasons underlying the restrictive policy of the Assessment Review Court are unclear. Although exceptions are occasionally allowed, the policy of the Assessment Review Court is that there is no public access to files. Whether access should be permitted in individual cases is a decision that is made by the Chairman. The typical Assessment Review Court file contains administrative documents that facilitate holding a hearing, and a computerized form that summarizes the pertinent facts of

77 The Motor Vehicle Dealers Act, s. 25b. See note 12, supra.

the dispute. This document is the sole informational document in the file, and its contents are otherwise publicly available. Everything recorded on the form may be found on the assessment roll in the appropriate municipality.

C. In Camera Hearings

Our survey revealed that in camera hearings are held surprisingly infrequently. Although all the tribunals and boards examined, except the Social Assistance Review Board, have a discretion to conduct in camera proceedings either as a result of The Statutory Powers Procedure Act, 1971 or of their enabling statutes, many have in fact never resorted to this power. Among the tribunals that have consistently held their entire proceedings in public are the Building Code Commission, the Environmental Assessment Board, the Land Compensation Board, the Milk Commission of Ontario and the Ontario Energy Board. The Commercial Registration Appeal Tribunal has held one in camera hearing since its creation.[78] Some tribunals, though, do conduct proceedings in camera when they seek to protect certain interests from apprehended injury that would result from disclosure. Financial or commercial information has been afforded protection in this way by the Ontario Highway Transport Board, the Assessment Review Court and the Environmental

78 It was established by Bill 170, 1968-1969 Session, An Act to Amend the Financial and Commercial Affairs Act, 1966. It came into effect on June 11, 1970.

Appeal Board. When a financial statement and, in the case of the Assessment Review Court, other income information is the subject of cross-examination, the hearing is conducted in camera, but only during the period of cross-examination. Sensitive personal information concerning the health, family or financial circumstances of individuals has received similar recognition by several tribunals -- the Criminal Injuries Compensation Board, the Assessment Review Court and Social Assistance Review Board. These tribunals conduct the entire hearing in camera. Since hearings of the Social Assistance Review Board are held in camera pursuant to statute,[79] it is not accurate to state that the privacy interest is protected by a policy of the tribunal. The policy is that of the legislature. The Assessment Review Court has conducted hearings in camera when there have been applications for the cancellation, reduction or refund of taxes by persons unable to pay taxes because of sickness or extreme poverty.[80] Hearings of the Criminal Injuries Compensation Board have been held in camera under specified statutory conditions, such as when there has been an alleged sexual offence.[81]

Finally, there is a related practice that should be noted. Although hearings of the Ontario Highway Transport Board are generally held in

79 The Ministry of Community and Social Services Act, s. 7c(1).

80 The Municipal Act, s. 636a(1)(d).

81 The Compensation for Victims of Crime Act, s. 12.

public, not all Board decisions are made after hearings.[82] The Board may dispose of an application or a reference as an internal administrative decision when there is no opposition or when pressing circumstances necessitate a grant of interim or temporary authority. This is referred to by the Board as an "in chambers" proceeding. The practice of granting interim and temporary authority is not sanctioned by the legislation but has been adopted by the Board to deal with situations in which the normal procedure is too cumbersome to cope with emergency or other special conditions. The procedure whereby an unopposed application may be considered in chambers is established by regulation.[83] When an application is treated summarily as an administrative decision, one cannot possibly be aware of a decision until after it is made. To this extent, there is less access than in an ordinary application when attendance at the hearing is possible. After a decision has been made with respect to an application, the file containing the relevant documents may be examined in the offices of the Board in the usual manner.

82 In 1976, 2042 of 6008 applications were considered in chambers. Ontario Highway Transport Board, Annual Report (Toronto: Ontario Highway Transport Board, 1977), Appendix "C". In 1975, the Board heard 1217 applications in chambers and held public hearings on 1525 applications. Final Report of the Select Committee on Highway Transportation of Goods, supra note 71 at 2.

83 R.R.O. 1970, Reg. 632, s. 8.

D. Annual Reports

Practices respecting annual reports vary among the administrative decision-makers surveyed. Like many administrative boards, the Ontario Energy Board and the Ontario Highway Transport Board are required by their respective enabling statutes to submit to the appropriate minister an annual report that will be eventually tabled in the legislature. The report of the Ontario Milk Marketing Board is published and is included in a supplement to one of the issues of Ontario Milk Producer, a periodical distributed to every producer in the province. The Land Compensation Board, the Environmental Appeal Board, the Commercial Registration Appeal Tribunal and the Milk Commission of Ontario report to the responsible minister and their activities are described in the annual report of the ministry. They do not, however, publish a separate report. The Social Assistance Review Board and the Environmental Assessment Board are not required by legislation to publish an annual report, but nonetheless do so in an effort to keep the public informed. This practice evinces an admirable public concern and should be followed by more tribunals, particularly those engaged in activities of broad significance.[84]

84 A recent report of the Standing Procedural Affairs Committee recommended that all administrative boards and tribunals table annual reports in the Legislature, and that the reports follow a standard format set by Management Board of Cabinet. Report of the Standing Procedural Affairs Committee on Agencies, Boards and Commissions, supra note 3, at 11-12.

The content of annual reports also varies with each board or tribunal. Generally they provide a brief description of the activities of the preceding year including a statistical summary. Some include biographical material about board members and general discussion about the nature of the industry or their area of concern. The annual report of the Criminal Injuries Compensation Board incorporates a summary of Board decisions of the previous year.[85]

Administrative decision-makers who do not constitute boards or tribunals report through the ministry of which they are part. The Registrar of Motor Vehicle Dealers makes a monthly report to the Director of the Consumer Protection Branch of the Ministry of Consumer and Commercial Relations. The information may be included in the annual report of the Ministry to the legislature.

E. Explanatory Information

Several of the administrative decision-makers surveyed provide explanatory materials to augment public understanding of their policies and practices and to aid lawyers and other persons who appear before them. The diversity of the practices reflects a range of attitudes to public information policy.

85 Section 4 of The Compensation for Victims of Crime Act, 1971 requires annual publication of a summary of the Board's decisions with reasons.

Certain boards -- the Commercial Registration Appeal Tribunal, the Environmental Appeal Board and the Social Assistance Review Board -- provide no supplementary information about their procedures. When a person appearing before one of these tribunals is represented by a lawyer or a skilled layman, this may not be a problem. If a person is unrepresented, an explanation of the procedures of the board would certainly facilitate his understanding of the process to which he is subject and the policies which may be applied. The Ontario Highway Transport Board[86] and the Assessment Review Court[87] do not publish anything themselves, but explanatory information is available elsewhere.

86 A manual entitled "Practice and Procedure before the Ontario Highway Transport Board" by Richard H. Rohmer, Q.C. and Dean Saul is available but in a limited quantity. It provides a general description of the procedure for the filing of an application or an objection, how to prepare oral and documentary evidence for a hearing as counsel for applicant or respondent, and a brief commentary on hearing procedures.

The Select Committee on Highway Transportation of Goods found the current practice of the Board to be inadequate, and suggested several methods which would improve public knowledge and comprehension of Board policies and procedure. Final Report of the Select Committee on Highway Transportation of Goods, supra note 71, at 45-49, 62.

In a recent interview, the new Chairman stated that the Ontario Highway Transport Board is preparing explanatory booklets for public dissemination.

87 Information about the Assessment Review Court may be obtained from the Institute of Municipal Assessors of Ontario, which publishes a series of technical bulletins including "You and the Assessment Review Court" No. 1/78, which is a general description of the responsibilities and functions of the court, and "A Study of the Statutory Powers Procedure Act" No. 4/76. Each of these bulletins is available at a cost of $1.00 at the Institute.

Other decision-makers have taken a more active attitude towards the dissemination of useful information. The Ministry of Community and Social Services publishes brochures that describe the scheme of benefits available from the Provincial Benefits Branch,[88] and the Vocational Rehabilitation Services Branch. The Registrar of Motor Vehicle Dealers distributes bulletins to registered motor vehicle dealers periodically, and particularly when there has been a change in policy or an amendment to the legislation. The Ontario Milk Marketing Board distributes a variety of explanatory materials to milk producers and the public.[89] The Land Compensation Board provides a set of "practice notes" which describe procedures to be used in filing documents and at hearings. The Environmental Assessment Board publishes an explanation of hearing procedures held under The Ontario Water Resources Act and The Environmental Protection Act, 1971.[90] A periodical, EA Update, is distributed by the Environmental Approvals Branch to persons and organizations interested in environmental assessment. The

88 Ont., Ministry of Community and Social Services, Your Family Benefits Handbook (Toronto: Ministry of Community and Social Services, March, 1975).

89 Many pamphlets are produced for the public, including Quota Policies, Pricing Fluid Milk at the Farm Level, How Ontario Producers Pay for Bulk Milk Haulage and What Milk Transportation is About. The General Manager, Mr. Lorne Hurd, has also prepared several papers, including "Functions and Responsibilities of the Ontario Milk Marketing Board" and "The Ontario Milk Marketing System", both of which are available on request.

90 Ont., Environmental Assessment Board, A Guide for Hearings Under the Ontario Water Resources Act, 1970 and the Environmental Protection Act, 1971, (Toronto: Environmental Assessment Board, October, 1976).

Branch has also prepared a manual explaining how to obtain an environmental approval.[91] The Criminal Injuries Compensation Board has distributed explanatory literature in several languages in hospital emergency rooms. It has also instructed policemen and Crown attorneys to inform victims of an alleged offence about their rights to compensation.

F. Access by Affected Persons

The issue of access by a person affected by a tribunal decision has to a great extent been settled by the rules of natural justice and The Statutory Powers Procedure Act, 1971. The tribunals surveyed were well aware of their obligations at common law and under statute. Those to which the rules of natural justice apply do not entertain any confidential submissions, nor do they accept any evidence not subject to the scrutiny of all parties.[92] A person, whether a party or an

91 Ont., Ministry of the Environment, Environmental Approvals Branch, A Guide to the Ministry of the Environment Approval Requirements (Toronto: Ministry of the Environment, 1977).

92 The procedures adopted by the Environmental Assessment Board for the Elliot Lake Uranium Mine Expansion Hearings reveal its sensitivity to the rules of natural justice. Although the Board has retained private consultants to facilitate comprehension of the evidence, their questions and information must be presented through the Board counsel during the hearing so that all parties can respond. The Ontario Energy Board follows a similar procedure. Any reports or studies prepared by Board staff or outside consultants are submitted to the hearing panel by Board counsel. This procedure was recommended in Re Magnasonic and Anti-Dumping Tribunal and Sarco Canada Ltd. v. Anti-Dumping Tribunal.

intervenor in a hearing, will have access to all information at the hearing. The only exception is the Criminal Injuries Compensation Board.[93]

When proceedings are also subject to a pre-hearing disclosure provision, a party will be afforded access to government reports and documentary evidence prior to the hearing. The procedure for implementing this right is left to the discretion of the party possessing the information.[94]

When a decision is made without a formal hearing by an administrative decision-maker free from the rules of natural justice and The Statutory Powers Procedure Act, 1971, access problems may arise. In this study, these problems are considered in the context of the decisions of the Vocational Rehabilitation Services Branch, the Provincial Benefits Branch and the Registrar of Motor Vehicle Dealers. Each makes decisions

93 See discussion 61-69, infra.

94 The information that must be provided is in the possession of a ministry, which is the opposite party at the hearing. The ministry can choose how it will permit a person access. It may send the documents by mail or allow examination at its office. The duty of the tribunal is to ensure that there has been sufficient compliance with this requirement so that a party is not surprised by the ministry's evidence at the hearing. Mundell, supra note 60, at 13.

as an internal administrative matter.[95] They generally do not grant access to persons who are the subjects of files. Both the Provincial Benefits Branch and the Vocational Rehabilitation Services Branch have adopted a very restrictive policy towards the disclosure of personal information to their clients.

Many boards and tribunals then have adopted practices conducive to increased accountability and public comprehension. Subsequent chapters will examine policies and practices respecting the kinds of information afforded special treatment. They will describe how various tribunals and other decision-makers deal with personal information, business information, staff reports, and information relating to policy-making. Finally, accessibility of tribunal decisions and "secret law" will be discussed.

95 Section 10c(9) of The Family Benefits Act provides that The Statutory Powers Procedure Act, 1971 does not apply to decisions of the Director of the Provincial Benefits Branch. Section 8 of The Vocational Rehabilitation Services Act provides that section 10c of The Family Benefits Act applies to the Director of the Vocational Rehabilitation Services Branch. Therefore The Statutory Powers Procedure Act, 1971 does not apply to his decisions. The Registrar of Motor Vehicle Dealers need not comply with The Statutory Powers Procedure Act, 1971 because he does not exercise a "statutory power of decision". The Registrar does not technically make decisions. He makes a "proposal" to refuse to grant or renew a registration or to suspend or revoke a registration (The Motor Vehicle Dealers Act, s. 7(1)). Also see Re Dabor Motors Ltd. and MacCormac (1975), 5 O.R. (2d) 473 (Div.Ct.).

CHAPTER IV

PERSONAL INFORMATION

Personal information is collected and maintained by certain decision-makers in the course of administering statutory schemes under which monetary benefits and services are provided to persons who satisfy specified legislative criteria. Generally, the information is required to determine the eligibility of a person to receive the benefit in question and to calculate the amount and extent of the benefit.

When considering how a freedom of information scheme should treat personal information, we must bear in mind that a resolution of the issue will depend on the effective reconciliation of diverse and often conflicting interests. These interests can be briefly described. In favour of disclosure is a public interest in the availability of information about the various decision-makers, whether administrative tribunals or ministry officials, to ensure a form of political accountability for the interpretation of their statutory mandates. A second interest favouring openness is that of the person affected by the decision who would certainly wish to have reports and other information concerning entitlement to benefits. On the other hand, there are also public and private interests in the protection of privacy, reflecting what is at least a visceral feeling and perhaps a more developed concept, that certain personal information should not be in the public domain without individual consent.

Further, effective administration of the legislation may be impeded by the disclosure of information that was furnished by private persons, professionals, and agencies on the understanding that it was to remain confidential. Their essential cooperation may be irrevocably discouraged if the information is divulged to the subjects. Finally and less convincingly, it may be argued that greater access to files is likely to encourage more adversarial and disputatious contact between the government and its clients with a resulting consumption of time and resources.

In the course of the interviews, representatives of the decision-makers surveyed did not describe their policies and practices in terms of these clashing interests. Yet their explanations suggest that at least an inchoate perception of this conflict guides their conduct.

A. Criminal Injuries Compensation Board

The Criminal Injuries Compensation Board may make an order for the payment of compensation where any person is injured or killed by any act or omission of any other person that occurs in three circumstances. It may be the result of a crime of violence that is an offence against the Criminal Code of Canada. Secondly, the act or omission may occur when one is lawfully arresting or attempting to arrest an offender or suspected offender for an offence against a person other than the applicant or his dependant or against their property, or in assisting

a peace officer in executing his law enforcement duties. Finally, it may occur when a person prevents or attempts to prevent the commission of an offence or suspected offence against a person other than the applicant or his dependant, or against their property. If the Board finds that injury or death was caused in such circumstances, it may allow compensation to be paid to the victim or a person responsible for the maintenance of the victim. Where the victim has died, the Board may order that compensation be paid to the dependants of the victim or to the person responsible for their maintenance.[96]

Section 7 of The Compensation for Victims of Crimes Act, 1971, establishes a list of matters for which compensation may be permitted. Included are pain and suffering, expenses actually and reasonably incurred or to be incurred as a result of the victim's injury or death, and pecuniary loss incurred by a victim as a result of total or partial disability affecting the victim's capacity for work.

Section 17 should also be noted. It provides that the Board should "have regard for all relevant circumstances, including any behaviour of the victim that may directly or indirectly have contributed to his injury or death." When an applicant has refused "reasonable cooperation" to the law enforcement authorities or failed to promptly report an offence to a law enforcement agency, the Board has a discretion to deny an order for compensation.

96 The Compensation for Victims of Crime Act, 1971, s. 5.

The information that is collected by the Board concerns the circumstances of the death or injury and the nature of the injury or loss suffered. The contents of the typical Board file reflect this focus.

Most of the information is supplied by the applicant. An applicant must complete and submit an application form that sets out the details of the incident; the name and address of the offender, if known; a description of his injuries and present physical condition; details of the claim; and a list of benefits received and to be received by the applicant. Appended to the form is an authorization for the release of medical information to the Board.[97]

In order to support a claim for compensation, an applicant must forward to the Board receipts or bills for out-of-pocket expenses, an employer's wage statement and confirmation of period of absence from work, copies of income tax returns for self-employed persons, the details of benefits received from any source as a result of injuries sustained, a certificate of conviction of the offender if available, and medical reports of all doctors who have rendered treatment to the applicant. If the applicant

97 "I hereby authorize the Criminal Injuries Compensation Board or its representatives to inspect or receive any and all information from my medical records, and agree to indemnify doctors, hospitals and staff, against any and all liability in any way arising out of such inspection or receipt of information."

has a lawyer,[98] the lawyer is requested to secure copies of any hospital records relating to the victim and the incident. If the victim is deceased, supplementary information is required. An applicant must submit a Marriage Certificate, Death Certificate, Birth Certificates for surviving children, information respecting details of the estate left by the deceased (including assets from all sources) and details of benefits received by the survivors from all sources.

The Criminal Injuries Compensation Board does compile information on its own. If an applicant is not represented and apparently unable to prepare his claim, the Board will obtain copies of any relevant medical and other information on his behalf. It was for this purpose that the authorization for the release of medical information was included in the standard application form.

The Board has established a panel of investigators consisting of a Chief of Investigation and two Assistant Investigators whose function is to amass information that would be relevant to the Board in a determination of whether a case is compensable and the extent of compensation. Originally, this duty was entrusted to the Registrar of the Board. However, the constantly increasing volume of claims necessitated the employment of field investigators and the creation of a specialized investigative office. Whether an investigation will be undertaken is a decision of the Chief of Investigation based on an

98 Applicants are represented in approximately 40-50% of the cases.

evaluation of the application form and supporting documentation.[99] If the materials suggest any question respecting the claim, a field investigation will be ordered. The results of the investigation will be described in an investigator's report, a copy of which will be maintained in the file.

As a matter of practice, the Chief of Investigation requests that the appropriate Chief of Police provide copies of police investigative reports including any statements taken from parties concerned. This material is furnished to the Board on the basis that it remain confidential.[100] Any information contained in the police report relevant to the issue of entitlement is recorded in the investigator's report.

The investigators are also responsible for gathering the medical and hospital records on behalf of unrepresented applicants.

The relevant materials, whether submitted by the applicant or gathered by the investigative staff, are organized into a Registrar's file or main file. From the main file a Member's Brief is compiled for the

99 The Chief of Investigations, Mr. J.H. Sheard, indicated that he has found it necessary to direct a field investigation in approximately 65% of the cases.

100 The standard form letter to Chiefs of Police concludes with the following sentence: "Be assured that any information received will be treated in strict confidence".

Board member or members who will hear the application. The Member's Brief includes all of the materials in the main file, with the exception of the police report. This is a recent innovation. Before 1976, the members of the Board received a copy of the police report, but did not reveal its contents to the applicant or his counsel in accordance with the assurance of confidentiality to the police. This would appear to be a violation of the rules of natural justice and of section 8 of The Statutory Powers Procedure Act, 1971. In 1976, with the change in membership in the Board, a new policy was adopted that was thought to be more consistent with The Statutory Powers Procedure Act, 1971. The police report was no longer included in the Member's Brief so that the members would not consider any information detrimental to the claim that was not available to the applicant. Instead the contents of the police report, relevant to the eligibility issue, are summarized and included in the investigator's report.

The Criminal Injuries Compensation Board maintains its records in strict confidence. No public access to files is granted. The expressed reason for the policy of confidentiality is that most files contain information of such a highly sensitive nature -- including hospital records, psychiatric reports, wage statements, income tax returns -- that disclosure would cause embarrassment to individuals. Furthermore, it may discourage people from seeking the benefits authorized by the statute. The confidentiality of many of these documents, such as medical reports and tax returns, are recognized by other statutes.

The only information that may be released is the Order of the Board. Whether access should be granted is a discretionary decision of the Registrar. A copy of a draft order may be provided if the person who has made a request has a satisfactory reason; for example, a lawyer preparing for a case in which similar injuries were suffered or where factual circumstances were parallel. The typical order briefly describes the circumstances of the case and indicates the amount of compensation awarded and the loss for which it was awarded. It does not contain reasons for the decision.

Certain provisions in The Compensation for Victims of Crime Act, 1971, recognize the sensitive nature of the matters in issue. Section 12 allows the Board to conduct hearings in camera when a public hearing would not be in the interests of a victim of an alleged sexual offence, or the dependants of a victim, or where it would be prejudicial to the trial of an alleged offender. Section 13 confers discretion on the Board to make an order prohibiting the publication of any report or account of the whole or any part of the evidence at a hearing. During the 1977 fiscal year, the Board ordered a restriction on the publication of evidence in approximately 10% of its cases.[101] Most of these cases were also heard in camera, as they were either applications in respect of a sexual offence or hearings where the offender's case was under appeal. In a few cases, publication of evidence was ordered to

101 Ont., Criminal Injuries Compensation Board, Eighth Report (Toronto: Criminal Injuries Compensation Board, June, 1977).

be restricted to prevent public disclosure of a large sum of compensation received by an applicant. This, however, has only been ordered in circumstances where the original offence was robbery, and the applicant was considered to be vulnerable to similar attacks.

The Board has adopted a policy of holding all hearings concerning sexual offences in camera. Since many victims have already publicly recounted their painful experiences during trials of the accused persons, the Board does not force them to endure the trauma of public testimony again.

Whether there is a problem of inadequate access by an applicant to information possessed by the Board will depend to a great extent on whether the applicant is represented by counsel. The investigator's report will be disclosed only if it contains information that, in the opinion of the Board members, is damaging to the claim. It is disclosed only immediately prior to the hearing, but the Board does grant an adjournment to allow an applicant or his lawyer time to review it. When a person is represented, most of the information possessed by the Board will have been submitted by his lawyer; he is therefore aware of its content. When a person is not represented, there may be an access problem because information relevant to the claim may have been collected on his behalf by the Board. The general policy with respect to this information is that only those matters which might influence a decision negatively are presented to an applicant for his clarification or contradiction. There are two reasons for this approach. By

concentrating only on the most contentious areas of a claim, the Board argues that it is conducting itself efficiently, maximizing the number of claims that may be heard. The second reason reflects the Board's perception of its function. The Board regards this hearing as being primarily for the benefit of the applicant. In many cases, it has compiled the information on his behalf. It regards the applicant as being present for the purpose of clarification and perhaps refutation, or to produce supplementary information. The hearing is not perceived as being in an adversary spirit. The Board is solicitous of the interests of the applicant so that it need only reveal information detrimental to his entitlement.

Although admirable motives animate Board practice governing client access to files, the policy does pose some questions and some dangers. A report may influence a Board member although he may not be aware of its effect. During the hearing, information contained in a report originally believed innocuous may assume a different significance when considered in combination with oral evidence. It may acquire a negative impact. For these reasons, the report should be disclosed as a matter of practice. Allowing an applicant to examine the report would not impair the efficiency of the hearing process.

Moreover, disclosure is certainly consistent with the fairness of the hearing procedures and the principles of natural justice. In fact, should an applicant be denied compensation, the failure to disclose the report to him at the hearing could constitute grounds for judicial review.

B. Vocational Rehabilitation Services Branch Ministry of Community and Social Services

The Vocational Rehabilitation Services Branch is responsible for the administration of The Vocational Rehabilitation Services Act[102] under which a disabled person may receive vocational rehabilitation services, maintenance allowances and other payments. A person must establish his eligibility to qualify for the services. He must first prove that he is a "disabled person"; that is, "a person who because of physical and mental impairment is incapable of pursuing regularly any substantially gainful occupation as determined by the regulations."[103] Secondly, it must be demonstrated that the provision of vocational rehabilitation services would permit the applicant to continually pursue a substantially gainful occupation at an optimum capacity.[104] In the lexicon of the Branch, this is known as "the feasibility issue." In dealing with both issues, information concerning the physical condition, social and vocational history, and educational potential of the applicant is collected. It is provided by the applicant, by counsellors in the Branch and by outside professionals consulted by the Branch.

An applicant for vocational rehabilitation services must submit a completed Form 1.[105] This document requires a brief description of

102 R.S.O. 1970, c. 484; R.R.O. 1970, Reg. 821.

103 The Vocational Rehabilitation Services Act, s. 1(b).

104 The Vocational Rehabilitation Services Act, s. 1(e), s. 5; R.R.O. 1970, Reg. 821, s. 1(2).

105 R.R.O. 1970, Reg. 821, s. 12.

his family circumstances, the nature of the disability, and of his educational and vocational history. It includes an authorization to the Ministry of Community and Social Services to release information to other persons and agencies concerned with his rehabilitation.[106] If a disabled person wishes to obtain a maintenance allowance, a Form 2 must be completed. This application requires detailed information about income, living expenses and assets of the applicant, including a list and description of all real and personal property. Form 2 is generally accompanied by Form 3 or "Consent to Inspect Assets" which authorizes any person appointed by the Director of the Vocational Rehabilitation Services Branch to inspect any assets of an applicant, including any insurance policy of a deceased spouse. The consent allows the Branch to verify information set out in Form 2. The final form is Form 4, a standardized medical report which generally appraises the medical condition of the applicant and notes special factors or conditions limiting his employment. This form is completed by a legally qualified medical practitioner. Its contents may be shown or explained to an applicant, depending on the practice of the doctor who has conducted the examination.

Once the eligibility of an applicant is established, the counsellor assigned to the case undertakes an assessment of the client with a view

106 "I hereby authorize the Ministry of Community and Social Services and its representatives to release information with respect to my disabled condition and my application for vocational rehabilitation services to such agencies, persons or employers as may be concerned with my rehabilitation."

to choosing an appropriate vocational goal for the client. In this process, he collects information about the physical, psychological and emotional state of the client. There is an evaluation of educational ability and potential. Much of this information is in the form of reports prepared by specialists who are retained by the Branch on a contractual basis. The counsellor is responsible for an analysis of the material that will result in a social assessment rehabilitation appraisal setting out a feasible rehabilitation plan. Finally, a brief summary memorandum is prepared for the Selection Committee, the body responsible for the approval of the plan. This document briefly describes the disability, sets out a cursory history, including an educational and social history, and outlines the recommended rehabilitation plan.

The regulations provide for a medical advisory board[107] to "assist the Director in determining the eligibility of applicants for vocational rehabilitation services by reviewing medical evidence ... [and] providing [him] with a report on the evidence with a specific finding as to whether or not the applicant may benefit from vocational rehabilitation services."[108] Although this suggests that the medical advisory board is another source of information relevant to the decision respecting eligibility, in practice it is of negligible significance. The Board consists of a single doctor who attends at the Branch offices one

107 R.R.O. 1970, Reg. 821, s. 14.

108 Id., s. 15.

afternoon each week to examine the files. His brief comments regarding the efficacy of the plan are recorded on a standard form in a few sentences.

The materials are maintained in two kinds of files. There is an "A" file, which is the assessment file containing materials[109] used to assess the nature of the disability and the potential for restoration to useful employment. The second type of file is the "R" or rehabilitation file which comprises the information[110] from the assessment file and records the progress of the client during rehabilitation, including periodic assessments of potential.

The Vocational Rehabilitation Services Branch adheres to a policy of strict confidentiality with respect to its records. Public access to client files is not permitted. This policy is generally understood by Branch personnel as a function of their experience and is supplemented by an internal memorandum instructing them not to release individual client information without the specific written consent of the client. The general policy is not absolute. Information is divulged to

109 It may include the following: the application (Form 1) medical reports, including Form 4, psychological reports, a record of social and vocational history, the memorandum to the Selection Committee, Consent to Inspect Assets form, and correspondence with the applicant.

110 It may include an application for a maintenance allowance, medical assessments, correspondence with educational agencies and others, and copies of invoices remitted on behalf of the applicant.

agencies and persons concerned with the rehabilitation of clients. Consent to its disclosure is granted when the client signs the authorization on the application form. The reason for the general access policy was stated very simply by the Branch. The personal and sensitive nature of the information in the possession of the Branch compels its confidentiality.

The Branch has adopted a similar policy governing client access to files. Generally, requests for information by a client are handled on a discretionary basis by supervisory personnel, not the counsellors. As a matter of practice, clients are not permitted to examine the files. Since there have been so few demands by clients for access, the Branch has not been forced to enunciate a comprehensive policy respecting client access.

Several reasons were suggested to support the general denial of client access. A major concern was that the release of information, particularly diagnoses or prognoses contained in medical or psychiatric reports, may be destructive or embarrassing to the client. Certain reports may have been provided to the Branch by persons or agencies on a confidential basis. A related issue currently under review at the Ministry is the nature of the obligations to persons furnishing the reports imposed on the Branch by the contractual relationship. The resolution of this question may have a decisive impact on the access issue. If, for example, the Ministry adopts a position that the consultant has a property right in the reports or information, then this would permit

denial of access and shift responsibility for the decision away from the Branch. Finally, many reports require subjective evaluation by Branch personnel. There is apprehension that disclosure would expose counsellors and supervisors to harassment or promote litigation compelling the Branch to defend subjective judgments and impressions.[111]

The client is afforded a form of access if his application for services is refused, or if his services are to be cancelled, reduced or suspended by the Director. A letter proposing the refusal or cancellation, as the case may be, is sent to the applicant or recipient in which detailed reasons for the decision are explained. Written representations against the proposed action may be filed with the Director. If the Director, after considering the representations, decides to implement his proposed action, notice of the decision with his reasons is sent to the applicant or recipient.[112] When a person requests that the decision be reviewed by the Social Assistance Review Board, any reports that the Director wishes to adduce at the hearing must be disclosed to the applicant prior to the hearing.[113] The Director, however, need not disclose all information in his possession. In fact, when the disclosure of a report such as a psychiatric

111 These concerns were expressed in the written submission by the Ministry of Community and Social Services to this Commission, M.C.S.S. Comments on Freedom of Information and Individual Privacy, (Sept. 29, 1977) at 4-5.

112 The Family Benefits Act, R.S.O. 1970, c. 157, s. 10c.

113 Id., s. 12(6).

evaluation, would possibly be harmful to an applicant, the Director indicated that he would forego reliance on the report at the hearing and avoid this danger.

C. Provincial Benefits Branch
Ministry of Community and Social Services

The Provincial Benefits Branch administers the scheme of benefits and allowances established by the Family Benefits legislation.[114] The interaction of The Family Benefits Act and its Regulations produces a complex system under which a number of classes of persons may be eligible for benefits and allowances. For the purposes of this paper, it is not necessary to detail the many classes that are created by the legislation. What is relevant, however, is that the applicant must be a "person in need" regardless of the category under which he wishes to qualify. A person in need is defined as a person whose budgetary requirements exceed his income as determined by the Regulations.

The issues of eligibility and the amount of benefit or allowance both require the collection of personal information. The concept of a "person in need" demands the provision of detailed financial data setting out the assets, amount and sources of income, and the nature and extent of the expenses of applicants and their families. Certain

114 The Family Benefits Act; R.R.O. 1970, Reg. 287.

classes of eligibility established by the legislation require that an applicant prove the existence of specified family circumstances or a medical condition, which necessitates the submission of other personal information. Among the many classes is that of the mother with a dependent child whose husband has deserted her for three months or more,[115] and the "permanently unemployable person." A permanently unemployable person is an applicant "who is unable to engage in remunerative employment for a prolonged period of time as verified by objective medical findings accepted by the medical advisory board."[116] Each of these categories explicitly require personal information to establish entitlement. Several other examples could readily have been provided from the legislation.[117] Whatever class an applicant may be within, the amount of his or her allowance will be based on the amount by which budgetary requirements exceed income.[118]

The required information is supplied to the Branch by the applicant and by field workers employed by the Ministry of Community and Social Services.

The Provincial Benefits Branch has created a variety of forms to facilitate the organized collection and presentation of information.

115 The Family Benefits Act, s. 7(1)(d).

116 R.R.O. 1970, Reg. 287, s. 1(3)(c).

117 Section 7 of the Act establishes a number of categories of eligible persons.

118 R.R.O. 1970, Reg. 287, s. 10(1).

Included are standard forms that are completed for almost all applications, and specialized forms designed for certain classes of eligible persons, such as the deserted mother or the blind or permanently unemployable persons, or for collection of detailed information about certain matters.

An applicant for an allowance under The Family Benefits Act must submit a completed Form 1, which is the general application. This form requires personal data about the family circumstances of the applicant, with a description of the living conditions. It includes a detailed list of all assets held by the applicant, his or her spouse and dependent children and a record of all income received referable to its source. If the application is made by a foster parent for an allowance, a separate form is used (Form 2). As with the Vocational Rehabilitation Services Branch, a Consent to Inspect Assets form is also completed. If the person is applying in respect of a medical disability, Form 4,[119] a standard medical report, must be submitted. This is accompanied by a separate consent form that permits the medical advisory board to inspect hospital records. When the medical disability suffered by the applicant is blindness, a different standard form medical report is employed (Form 5).[120]

119 Form 4 records the complaint and brief history of the present impairment; an examination; comments about the limitations imposed by the impairment and the care required; an evaluation of the disability; recommendations and the doctor's certificate.

120 Form 5 records a brief history; comments respecting visual acuity and visual field; a description of abnormalities; diagnosis; treatment; evaluation and prescription.

The field workers employed by the Ministry are under a statutory duty to collect information on behalf of the Branch. Field workers and other persons designated as an intake authority by the Director must ensure that the appropriate application is completed by or on behalf of the applicant, and sent to the Director together with any supporting material.[121] The nature of the ancillary documents depends on the kind of application.[122] For example, an unwed mother must submit a standard statutory declaration about her children. A deserted mother must complete a statutory declaration setting out the bare details of the desertion. The field worker may supplement this by submitting a "desertion report" form that often includes narrative comments. Additional forms collect information about insurance policies, savings deposits and earnings. The field worker has a form on which to record a lay medical report to the medical advisory board, based on observations recorded during an interview with the applicant (the "011"). It is completed whenever an applicant applies as a disabled person, a permanently unemployable person, or a dependent father.

The informational function of the field worker is not restricted to securing information for the initial application. Information is provided on a continuing basis to ensure that a recipient remains eligible for allowances or benefits. Periodically, the field worker

121 R.R.O. 1970, Reg. 287, s. 16.

122 The Branch has developed approximately 40 forms to collect various information. Ont., Ministry of Community and Social Services, Field Worker's Orientation Kit.

is requested to do a present condition report (or "P.C.R.") about a client. The report may be a narrative or follow a prescribed form that provides information in a manner identical to the basic application form.

The other apparent source of information is the medical advisory board.[123] Its statutory function is to advise the Director of the Provincial Benefits Branch on the eligibility issue. The regulations provide that it must review the medical evidence submitted, obtain any additional evidence, and report to the Director whether an applicant or recipient is a blind person, or disabled person, or a permanently unemployable person within the meaning of the legislation.[124] In practice, the medical advisory board does not gather information. Its primary duty is to evaluate the medical information provided, the Form 4 and the 011 Form. The applicant is never physically examined by the medical advisory board. Occasionally the standard medical reports are supplemented by medical records obtained from hospitals. After a consideration of these materials, the board reports to the Director. The "report", however, is simply a single sentence stating whether or not in the opinion of the medical advisory board, the applicant is blind, or disabled or permanently unemployable. It is not a narrative report containing observations or diagnoses. Despite its brevity and

123 The medical advisory board consists of four physicians, one of whom acts as chairman.

124 R.R.O. 1970, Reg. 287, s. 20.

advisory nature, the medical advisory board report is very significant because the Director will almost invariably follow its conclusion in making a decision about an application.[125]

The policy followed by the Provincial Benefits Branch towards access to files parallels that of the Vocational Rehabilitation Services Branch. Generally, no public access is allowed to client records. In its explanatory brochure, the Branch assures applicants that information will be maintained in strict confidence.[126] In the past, there have been requests about clients from collection agencies, insurance adjusters and landlords, all of which have been refused. The policy of non-disclosure, however, is not absolute. Although client information is not available to persons outside of government, there is some sharing with other agencies and ministries of the Ontario government. When a recipient is a tenant in low rental housing accommodation, information may also be disclosed to the Ministry of Housing.[127] Information may also be transferred to other programs having a social assistance orientation, such as the Vocational Rehabilitation Services Branch, or to a municipality to facilitate its administration of The General Welfare Assistance Act.[128]

125 Re Director, Family Benefits Branch and Board of Review et al, (1975) 5 O.R. (2d) 65 (Div.Ct.).
This case considered the role of the medical advisory board in relation to the Director and the Social Assistance Review Board.

126 Your Family Benefits Handbook, supra note 88, at 22.

127 The Family Benefits Act, s. 5(2).

128 R.S.O. 1970, c. 192.

The policy of confidentiality follows from the nature of the information. The administration of the legislation necessitates information of the most sensitive nature. Each application provides details about an individual's expenses, assets and income. Many files include intimate details about the relatives or families of applicants. Others contain medical reports.

The policy towards client access is generally restrictive. An applicant or recipient has no right to see his file nor any of its contents. The policy was described as a discretionary one in which access may be granted to a person when information other than medical information was sought. When a client seeks to examine a Form 4 or other medical reports, there is an absolute rule that no access is permitted. The discretionary policy is based on the belief that the disclosure of certain information or subjective comments of field workers may be damaging to clients. This rationale is similar to that articulated by the Vocational Rehabilitation Services Branch. However, it is not clear that access is granted as a matter of practice when this danger is not present. Interviews with legal aid organizations suggested that the practice is that there is no disclosure of reports or information to clients, without any inquiry as to the harm that may ensue from allowing access.

The restrictive policy towards medical reports is based on a generalized notion that medical reports have a special status as a consequence of the doctor-patient relationship that does not allow their disclosure.

A secondary reason is an apprehension that the disclosure of medical reports would inhibit necessary cooperation from medical practitioners and hospitals.

If an application is to be refused, or a benefit reduced, suspended or cancelled, the Director must give notice of a proposal to do so together with his reasons. As a form of internal review, an aggrieved person may file written representations with the Director. If written representations are not filed, or after they are filed and considered by the Director, the Director must give notice of his decision to carry out his proposed action with reasons. This, however, is only a limited form of disclosure. The "reasons" provided by the Provincial Benefits Branch are expressed in a brief computerized statement that reflects the sparse statutory language. Thus a notice of decision does not explain reasons in the context of the facts of an individual application or case. It would not inform a person why his application was refused or his benefit cancelled or suspended except in a vague and general manner.[129]

If a person appeals a decision of the Director to the Social Assistance Review Board, he is entitled as of right to examine any written submission of the Director, or other written or documentary evidence

129 An example from a letter to an applicant: "Our Medical Advisory Board has reviewed the medical evidence submitted in support of your application and has expressed the opinion that you cannot be considered disabled or a permanently unemployable person within the meaning of the Family Benefits Legislation."

that will be given in evidence at the hearing.[130] The Director of the Provincial Benefits Branch rarely attends, nor is he represented at the hearing. His submissions are in the form of a report. A problem that came to our attention is that although a copy of the report received by the Social Assistance Review Board has additional documentation annexed to it, the report sent to the applicant or recipient often lacks these materials. This omission detracts from the statutory rights of pre-hearing disclosure.

D. Social Assistance Review Board

The Social Assistance Review Board was created by The Ministry of Community and Social Services Act. It holds hearings to review decisions made pursuant to four social assistance statutes -- The Family Benefits Act, The Vocational Rehabilitation Services Act, The General Welfare Assistance Act, and The Ontario Guaranteed Annual Income Act, 1974.[131]

All information in the possession of the Board is collected in the course of its hearing function. Each document in some way facilitates

130 The Family Benefits Act, s. 12(6).

131 S.O. 1974, c. 58.

conduct of the hearing.[132]

The Social Assistance Review Board has adopted a policy of absolute confidentiality. No public access is granted to hearing files. Nor is client information shared with any other government agency, provincial or otherwise. That this is the policy is not surprising. By statute, all hearings of the Board must be conducted in camera.[133] Explicit statutory recognition of the sensitive and personal nature of the issues in question compels confidential treatment of the files. Otherwise the policy underlying the in camera hearing will be rendered nugatory.

132 An application form, the Notice of Request for Hearing (or Form 1) is submitted to the Board Chairman by an applicant or recipient to initiate the process. It sets out name and address, the kind of decision which is to be reviewed, and the grounds upon which review is sought. The Board then requests a written report, describing the facts of the case and reasons from the person who has rendered the decision in issue. Once a date for the hearing is established, a Notice of Hearing is sent to the parties. During the hearing, the presiding member or members of the Board will record the facts of the case, the evidence given and his or her decision with reasons on a standardized form (the Hearing Summary). This is an internal form designed to facilitate an organized summary of the evidence. After the hearing, a Notice of Decision is sent by mail to each of the parties. It includes the principal findings of fact based on the evidence officially noticed, and the conclusions based on those findings. A Notice of Delivery of Decision records the sending of the Notice of Decision to the parties. Thus a typical file contains the following: Form 1, request for a report, Notice of Hearing, the Hearing Summary, the report, Notice of Decision, and the Notice of Delivery of Decision. An applicant or recipient may submit another medical report or Form 4 as an exhibit at the hearing, and it may remain in the file.

133 The Ministry of Community and Social Services Act, s. 7c(1).

There is, in a sense, a limited form of disclosure. The Notice of Decision, with identifying names deleted, is available for inspection at the offices of the Board, and is provided to various libraries. In this form, the notices reveal the policies and reasoning of the Board without divulging personal information referable to an individual or family. This effectively reconciles two conflicting interests. There is a general public interest in the accessibility of decisions of administrative decision-makers. This permits a person to ascertain the policies followed by the Board so that a persuasive argument can be prepared. Public access is also a matter of political accountability. It allows interested persons to evaluate the performance of the Board as revealed by its decisions. Opposed to the public interest is the interest in non-disclosure of personal information. This is both a private interest and a public interest. The former of course can be more readily appreciated. Persons do not wish to reveal information about their financial situation, mental health problems or family difficulties to strangers. The public interest in confidentiality lies in a general recognition that society must protect individual integrity and dignity, and that the public disclosure of this information would be destructive of that ideal.

There is not really an issue of client access to information maintained by the Social Assistance Review Board. The Board collects no information on its own initiative. If increased disclosure is required by an appellant, it is not from the Board, but from the government decision-maker who has denied his application or suspended or cancelled his benefit or service.

E. Discussion

The policies and practices of each of these decision-makers respecting public access to personal information reveal a profound concern for the preservation of individual privacy. Underlying this attitude is a belief that the sensitive nature of the information justifies confidential treatment.[134] Although personal privacy is an issue beyond the purview of this paper,[135] the possible inclusion of administrative decision-makers within a freedom of information regime requires that some mention be made of alternative mechanisms that could guard this interest.

Without exception, freedom of information legislation of several jurisdictions has afforded protection to personal information. There are two primary statutory methods by which this has been effected. The legislation may create a general right of access to government information subject to a series of exemptions intended to secure designated interests. This method has been followed in the United States, New Brunswick[136] and in the bill currently under consideration by the Australian Parliament. The second alternative is to grant a

134 M.C.S.S. Comments on Freedom of Information and Individual Privacy, supra note 111, at 3.

135 Privacy and Personal Data Protection (Commission research publication, unpublished to date).

136 S.N.B. 1978, c. R-10.3.

right of access only to defined categories of information. Documents or information not included within the named categories are not publicly available as of right, but may be disclosed at the discretion of the governmental custodian. This method may be chosen in conjunction with the former, establishing exemptions to the available categories. In fact, the Nova Scotia legislature selected this approach in its Freedom of Information Act.[137]

These various jurisdictions have chosen similar language to effect their purposes. Both the Nova Scotia Freedom of Information Act and the New Brunswick Right to Information Act deny access to "... personal information concerning another person." The American and Australian legislation, reflecting a sharpened concern for government disclosure, require the satisfaction of a more stringent test before confidentiality can be justified. The American Freedom of Information Act exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."[138] The Australian Bill excludes from mandatory disclosure "[a] document ... if its disclosure ... would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person)."[139] These statutes would compel production of personal information that is protected under the New Brunswick and Nova

137 S.N.S. 1977, c. 10.

138 5 U.S.C. s. 552(c)(4) (emphasis added).

139 Freedom of Information Bill, s. 30.

Scotia legislation. If the disclosure of personal information is not "unwarranted" or "unreasonable", it is mandatory. Under the two provincial statutes, personal information is immune from public scrutiny without any inquiry into the anticipated effect of exposure. The approach adopted by Australia and the United States explicitly demands that in every case the potential effect of access be balanced against the interest of the person requesting the information. Although these approaches reflect different attitudes about the weight to be given the privacy interest, there is a basic consensus among the various jurisdictions about the need to afford it substantial protection. As a general matter, whether personal information deserves confidential treatment is not a controversial issue.

The difficult question is whether a person affected by a government decision that may rest on medical or psychological assessment is entitled to that information. Implicit are profound issues concerning the practice of medicine and the obligations of other professionals, such as psychologists and social workers, to persons whom they counsel. A comprehensive analysis is certainly beyond the scope of this study. However the issue must be discussed in a general way because it is interwoven with the problem of due process. Its significance can best be appreciated if considered in the context of the Family Benefits legislation.[140]

140 A recent newspaper article described several problems encountered by Family Benefits recipients. See "Enter a man, exit family benefits", Toronto Star, Jan. 30, 1979.

An applicant or recipient under The Family Benefits Act currently has no right to examine any reports about him nor to be informed of their content unless he appeals a decision to the Social Assistance Review Board.[141] Section 12(6) of The Family Benefits Act allows an applicant to examine the written submission of the Director, prior to the Board hearing, if the Director chooses not to appear at the hearing, or any written or documentary evidence or any report that the Director will adduce at the hearing. Apparently this provision affords disclosure of the case against him. Insofar as the dispute does not concern medical information, this is true. The Director must allow examination of any reports before he can produce them at the hearing.

When medical information is an issue, the situation is altogether different.[142] Eligibility for benefits may depend on an applicant proving that he is a "blind person," or a "disabled person" or a "permanently unemployable person" within the meaning of the legislation.

141 After this paper was written, the Ontario Court of Appeal decided a very interesting case, Re Downing and Graydon (1979) 21 O.R. (2d) 292. The Court held that although employment standards officers did not have to follow The Statutory Powers Procedure Act, 1971 in the exercise of certain powers under The Employment Standards Act, 1974, S.O. 1974, c. 112, they nevertheless had to conform to the common law rules of natural justice, and particularly the audi alteram partem rule. This case may form a basis from which one can argue that the Director of the Provincial Benefits Branch, although similarly immune from The Statutory Powers Procedure Act, 1971, should follow the rules of natural justice and apprise applicants about information and documents prejudicial to their applications.

142 There was a very helpful submission to the Commission on this very subject. See M. Elizabeth Atcheson, A Discussion of Medical Reports under The Family Benefits Act, R.S.O. 1970, c. 157 as amended (May, 1978).

Each of these categories requires the submission of the standard medical advisory board. Supplementary medical information from physicians and hospitals may be sought by the board. After an assessment of the medical information, the medical advisory board reports to the Director its opinion whether the applicant is within the legislative definition of "disabled," "blind person," or "permanently unemployable person," as the case may be. This "report" is but a single sentence without supporting reasons. When the Director notifies the applicant of the decision, it too is in that uninformative form.[143] Furthermore, should an applicant appeal the decision to the Social Assistance Review Board, the Director will file a submission prior to the hearing reiterating the opinion of the medical advisory board, and that he has accepted it. At the hearing, no medical evidence is adduced by the Director.

Few applicants retain a copy of the Form 4 in their possession or are aware of its contents. The general practice appears to be that the examining physician sends the Form 4 directly to the Provincial Benefits Branch without affording the applicant an opportunity to peruse it. An exception to this may occur if the applicant receives instructions to request a copy of the Form 4, or if his representatives communicate with the doctor. Most applicants, however, apparently seek legal

143 Supra note 129.

advice only after the application is refused when the Form 4 is not available.[144]

The effect of these practices is that an applicant whose eligibility is refused cannot possibly discover the basis for the decision. The reasons for denial are kept beyond his grasp. All that an applicant knows is that the medical advisory board is of the opinion that the legislative criteria are not satisfied. The rules of natural justice are to no avail, for they do not compel disclosure of reports that are not considered by a tribunal. They ensure only that if a report is presented to a tribunal, the other party should be able to answer it. The procedures of the Social Assistance Review Board are governed by The Statutory Powers Procedure Act, 1971. Section 8 provides that "[where] the good character, propriety of conduct or competence of a party is an issue in any proceedings, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto." It is doubtful, however, whether this provision would force disclosure of medical reports as the relevant issue is not "good character, propriety of conduct or competence of a party." Furthermore, section 8 does not require that the reports be furnished to a party, only "reasonable information of any allegations." Consequently an applicant suffers the effects of the medical reports but cannot in any real sense answer them because the underlying reasons are kept secret.

144 Supra note 142. Conversations with persons working in Toronto legal aid clinics confirmed this trend.

These problems could be mitigated and probably cured if the Provincial Benefits Branch allowed access to the Form 4 and other medical information. This would expose the basis on which the opinion of the medical advisory board rests. The current policy, however, is that there is absolutely no access to medical reports. The reason for this policy was not clearly articulated, but apparently relied upon a vague concept of medical privilege that would justify withholding the medical reports from the applicant. In fact, such a privilege neither exists at common law nor by statute in Ontario. Furthermore, Wigmore notes that if a privilege does exist, "the privilege is plainly that of the patient, not the physician, and the latter cannot therefore claim it if the patient abandons it."[145] Thus, a notion of privilege cannot support the policy.

However, it is extremely doubtful that an applicant has a legal right of access to medical reports concerning his own condition. By statute, the records of a patient's treatment while in a hospital are the property of the hospital.[146] This certainly weakens any claim to examine medical reports secured by the medical advisory board from a hospital. Whether there is currently any right by an applicant to see the Form 4 is equally uncertain. The definition of "professional misconduct" contemplates that a doctor may withhold a medical report

145 8 Wigmore, Evidence, s. 2386 (McNaughton rev. 1961).

146 The Public Hospitals Act, R.S.O. 1970, c. 378, s. 11.

from a patient for cause.[147] Thus there is a discretion not to disclose medical reports in the attending doctor.

Psychiatric information is similarly sheltered from the patient.[148] An applicant then does not possess an unqualified right to examine medical reports about his condition. Legislation has conferred the decision to grant patient access on the doctors and hospitals.

Whether the current legal position should be altered by statute is an issue of controversy. Proponents for increased access argue that mandatory disclosure is desirable on a number of grounds, including its consistency with fair procedures.[149] Opposed to this is the medical profession, reluctant to modify the present position, and advocating a limited right of disclosure, subject to the discretion of a physician. Two reasons are generally cited in support of this stance. Revealing diagnoses or other medical information to certain patients may have a psychologically detrimental effect on them. Secondly, there may be a decline in the quality of health care because the possible exposure of records will encourage doctors to record less

147 Section 26.26 of O. Reg. 577/75 under The Health Disciplines Act, 1974 provides that "'professional misconduct' means, ... failing to provide within a reasonable time and without cause any report or certificate requested by a patient or his authorized agent in respect of an examination or treatment performed by the member".

148 The Mental Health Act, s. 17.

149 Ison, supra note 5, at 81-103.

information, although the information may be necessary or at least helpful at a later date.[150]

The conflicting arguments respecting this aspect of the access issue emphasize the necessity of its careful consideration if a freedom of information scheme is implemented. Other jurisdictions have permitted access to information concerning the person making the request. The Nova Scotia Freedom of Information Act expressly provides for this right.[151] In the United States Freedom of Information Act, none of the exemptions exclude public access to medical information about the requestor. The approach of the new Australian bill is particularly interesting. An individual may be granted access to a document containing personal information concerning him. If the document includes "... information of a medical or psychiatric nature ... and it appears ... that the disclosure of the information to that person might be prejudicial to the physical or mental health or well-being of that person, the principal officer or minister may direct that access ... be given ... instead to a medical practitioner to be nominated by him."[152] This is a simple mechanism that may answer reservations of the medical community and will afford a person procedural due process. A very similar practice is currently in effect at the Workmen's

150 Brief of the Ontario Medical Association to the Commission on Freedom of Information and Individual Privacy, at 3-4.

151 Freedom of Information Act, s. 3(9), s. 6(2)(d).

152 Freedom of Information Bill, s. 30(3).

Compensation Board. Although a claimant is denied access to his own file, designated client representatives, including lay representatives, are afforded access on condition that they sign an undertaking not to divulge the contents of the medical reports to claimants without the permission of the doctor.[153] Such a practice could be implemented in Ontario, either by internal administrative reform or by statute.

153 Ison, supra note 5, at 75-77.

CHAPTER V

BUSINESS INFORMATION

Diverse business information is collected by many Ontario decision-makers with various statutory responsibilities. It is gathered by decision-makers such as the several Registrars in the Ministry of Consumer and Commercial Relations, who determine who will be permitted to carry on certain business activities. It is gathered by boards entrusted with more comprehensive regulatory duties, such as the Ontario Energy Board and agricultural marketing boards. Other tribunals, like the Assessment Review Court and the Land Compensation Board, although unconcerned with the conduct of business, collect business information when it is germane to their decisions.

In this paper, the term "business information" has a broad meaning. It refers to financial information -- financial statements; tax information; cost, revenue, expenditure, and income data; financial forecasts -- and commercial information -- process and plant information; customer lists; contractual information. Business information also refers to any information about a person or entity carrying on business, whether submitted by the person or entity or collected by the government.

To the extent that business information is not otherwise available to the public,[154] there is a confidentiality issue that must be addressed by freedom of information reform. As with personal privacy, a solution depends on an appropriate balance between distinct and conflicting interests, each with its own urgent claim for recognition.

Public interest in political accountability favours disclosure. Opposing this are public[155] and private interests promoting the confidentiality of certain business information because its disclosure

154 Whether certain business information is considered to be "otherwise available to the public" depends on the nature of the company and other statutes. Companies that offer their shares to the public must file financial information that "non-offering" or "private" companies need not (The Securities Act, R.S.O. 1970, c. 426, The Business Corporations Act, R.S.O. 1970, c. 53). If information is rendered susceptible to public examination, there ceases to be confidentiality issue in relation to it. The confidentiality issue must be considered against a statutory background establishing public access to limited business information (including The Corporations Information Act, 1976, S.O. 1976, c. 66; The Bulk Sales Act, R.S.O. 1970, c. 52; The Corporation Securities Registration Act, R.S.O. 1970, c. 88; The Personal Property Security Act, R.S.O. 1970, c. 344).

155 If a discussion about freedom of information and business confidentiality classifies interests favouring secrecy as exclusively private, those interests may be unfairly compared with the public interest in supervising government regulation of commercial activity. A public interest will inevitably prevail over an interest perceived to be "only" private. This argument is presented in S.L. Cohn and H.I. Zuckman, "FCC v. Schreiber: In Camera and the Administrative Agency" (1968), 56 Geo. L.J. 451 at 462:

> "Any expression which contrasts private interests with public ones places the businessman at a decided psychological disadvantage. It should, instead, be applied in terms of weighing the public interest in protecting the businessman's enterprise from serious damage or destruction against the public interest in full disclosure."

might cause competitive disadvantage or otherwise be detrimental to the person or entity to which it relates. The private interest in business confidentiality is patent. Businesses wish to preserve the secrecy of inventions, customer lists and processes developed with their own financial and human resources. Although it may be less obvious, there may be a public interest in business confidentiality as well. In simple terms, there is indirect, and perhaps direct, benefit to the public ensuing from the research and ingenuity undertaken by the private sector with the hope of future profits. Without assurances of protection, such activity might not be initiated. A public interest in commercial confidentiality has received statutory recognition in Ontario.[156]

Whether public disclosure would cause information to be withheld from decision-makers must be considered. If denied sufficient information to render sound decisions, a decision-maker may be unable to fulfill its statutory duties. Although there is a temptation to conceptualize this interest as that of the government, it may be more accurate to view it as public interest in the quality of decisions and effective regulation.

Persons affected by decisions in which business information is in issue would certainly have an acute interest in its disclosure.

156 The Statutory Powers Procedure Act, 1971, s. 9. Patent laws and judicial protection of trade secrets may similarly imply recognition of this as a public interest.

However, if the desired information is submitted by or about a competitor, the latter may suffer irrevocable damage by even limited disclosure during a hearing. How can the rules of natural justice be reconciled with legitimate claims to business confidentiality? This is not an abstract academic question. It is a practical procedural problem that several decision-makers have attempted to resolve in an as yet informal manner.

During the interviews, several persons perceived the tensions between accountability and business secrecy, and the heightened conflict between these forces in the context of the public hearing.

A. Land Compensation Board

The Land Compensation Board conducts hearings pursuant to The Expropriations Act[157] to determine the compensation payable when a statutory authority[158] expropriates land or causes injurious affection. Two routes can lead to a Board hearing. If a statutory authority and an owner are unable to agree upon the compensation, either one of them may require the dispute to be negotiated by a board of negotiation. If the negotiation proceedings do not result in a

157 R.S.O. 1970, c. 154.

158 Section 1(1)m of The Expropriations Act defines "statutory authority" to mean "the Crown or any person empowered by statute to expropriate land or cause injurious affection".

settlement, the statutory authority or the owner may require a hearing by the Land Compensation Board. The other alternative is to seek a Board hearing directly, without the intervening negotiations. To do this, however, the consent of both parties is necessary.[159]

The sole function of the Board is to adjudicate the issue of compensation and other matters required by legislation.[160] The Board depends on the opposing parties to provide information necessary to the determination. Very basic information must be supplied by each party on prescribed procedural forms that are in the nature of pleadings.[161] During the hearing, a party may adduce documents and exhibits to support its case. The Board gathers no information on its own initiative, either in relation to individual cases or generally about issues relating to land compensation.

The Board files reflect its judicial character. The typical hearing file contains the documents generated from the initiation of the hearing to its conclusion. It travels with the Board members conducting the hearing. Once the hearing is concluded, the hearing file is destroyed. The Board also maintains a Registrar's file, which contains the documents included in the hearing file and correspondence related to

159 The Expropriations Act, s. 26, s. 27(6), s. 28.

160 Id., s. 28.

161 The forms are set out in R.R.O. 1970, Reg. 286, under the Act. Included are Notice of Arbitration, Reply, Statement of Claim, Certificate of Readiness.

the hearing. The additional documents are usually internal administrative memoranda and letters concerning procedural matters, such as the convenient date for the hearing and requests for witness summons.

The Board has adopted a policy of openness. The Registrar's file[162] is available for public inspection at the Board offices[163] upon completion of an application form. All hearings have been held in public to date.

Two practices affect this otherwise laudable policy. Firstly, the Board neither provides copies of documents nor facilities for their reproduction because it is apprehensive about the attendant expense. However the Board will provide copies of its decisions on request. The rest of the information in a file must be copied by hand. For a person interested in a detailed examination of supporting documentation used in a hearing, this is not a convenient form of access. Allowing the public to obtain copies at cost would certainly make the current "right" of access more useful.

162 Included are Notice of Arbitration, Statement of Claim, Reply, Certificates of Readiness, Appointment for Hearing, a list of exhibits, correspondence, clerk's record of the hearing, Decision, Order.

163 This policy is a recent innovation. Formerly no public access was granted to the Registrar's file. The hearing file was the "public" file. If the hearing file was not available, public access was granted to the Registrar's file. The extent of disclosure however depended on the discretion of the Registrar who occasionally found it necessary to remove abusive letters.

The second practice concerns the availability of exhibits. An opportunity to inspect the exhibits presented by the parties allows a better comprehension of what transpired at the hearing. Moreover it may inform future parties about the kinds of evidence that would most effectively support an argument. However it is very unlikely that exhibits will be available in Board files. After the conclusion of a hearing and the expiry of the period for further appeal, the Registrar requests that parties retrieve their exhibits. If the exhibits are not recovered, they are destroyed because they would otherwise consume valuable storage space. Before the end of the time for appeal, exhibits are stored in the Board offices where they may be examined on request.

Business information may be presented by a claimant to show a commercial loss arising from expropriation. Appraisal reports may include income information. Financial statements and other business information may be put in evidence. The Board has treated this information in a manner consistent with its general policy. It has been presented in public during hearings and is available for inspection in the exhibits files.

There is no problem of party access to information. All information that is considered by the Board is available to each party. Moreover, the Land Compensation Board is one of the few administrative tribunals subject to the discovery rules of the Supreme Court of Ontario.[164]

164 R.R.O. 1970, Reg. 286, s. 13.

Therefore, parties have the substantial advantage of access to relevant information and documents prior to the commencement of the hearing. However when the Crown is a party, the application of the discovery rules is subject to section 12 of The Proceedings Against the Crown Act[165] which imports a statutory Crown privilege respecting testimony and production of documents.

B. Environmental Approvals Branch of the Ministry of the Environment, Environmental Assessment Board, Environmental Appeal Board

The province has enacted three statutes — The Ontario Water Resources Act, The Environmental Protection Act, 1971 and The Environmental Assessment Act, 1975 -- to protect and conserve the natural environment.[166] The statutes create two basic schemes for prior review and continuing supervision of various projects.[167] The Ontario

165 R.S.O. 1970, c. 365.

166 The Environmental Protection Act, 1971, s. 2; The Environmental Assessment Act, 1975, s. 2. The Ministry of the Environment also administers The Pesticides Act, 1973. Since it does not involve the Environmental Assessment Board, it will not be discussed here.

167 The complex approvals process established by The Ontario Water Resources Act, The Environmental Protection Act, 1971 and The Environmental Assessment Act, 1975 cannot be explained concisely. For further guidance, see A Guide to the Ministry of the Environment Approval Requirements, supra note 91; A Guide for Hearings under The Ontario Water Resources Act, 1970 and The Environmental Protection Act, 1971, supra note 90.

Water Resources Act and The Environmental Protection Act, 1971 require that a licence, approval, permit or certificate of approval[168] be obtained from the Ministry of the Environment before certain activities affecting the environment are undertaken. Where projects are subject to review under The Environmental Assessment Act, 1975, a proponent[169] cannot proceed with the "undertaking"[170] unless it is approved by either the Minister of the Environment or the Environmental Assessment Board.

Most applications under The Ontario Water Resources Act and The Environmental Protection Act, 1971 are decided by the Director of the Environmental Approvals Branch of the Ministry. Some minor approvals are made by the six Regional Directors. Applications must conform with the relevant statute, regulations, and Ministry engineering guidelines. Although the majority of these decisions are internal administrative decisions made without a public hearing, several kinds

168 The Ontario Water Resources Act uses the term "approval" (s. 41, s. 42). The Environmental Protection Act, 1971 refers to the issue of a "certificate of approval" (s. 8, s. 31, s. 57).

169 Section 1(k) defines "proponent" to mean "a person who (i) carries out or proposes to carry out an undertaking, or (ii) is the owner or person having, charge, management or control of an undertaking".

170 Section 1(o) defines "undertaking" to mean (i) an enterprise or activity or a proposal, plan or program in respect of an enterprise or activity by or on behalf of Her Majesty in right of Ontario, by a public body or public bodies or by a municipality or municipalities, or (ii) a major commercial or business enterprise or activity or a proposal, plan or program in respect of a major commercial or business enterprise or activity of a person or persons other than a person or persons referred to in subclause i that is designated by the regulations".

of approvals are made after a formal hearing by the Environmental Assessment Board. Public hearings are mandatory in some circumstances.[171] When certain other approvals are sought, the Director has a discretion to require a hearing.[172] The purpose of a hearing by the Environmental Assessment Board under The Ontario Water Resources Act and The Environmental Protection Act, 1971 is to make a report containing information and recommendations for consideration by the Director. It is not to render a decision about the application. That is the responsibility of the Director.

The Environmental Assessment Act, 1975 establishes another framework for comprehensive review of proposed undertakings. A proponent of an undertaking must submit an environmental assessment[173] to the Minister of the Environment. Before the undertaking can commence, the Minister or the Environmental Assessment Board must accept the environmental assessment and approve the undertaking. The Minister, the proponent, or a member of the public may require the Environmental Assessment Board to conduct a public hearing under Part I of The Environmental

171 The Environmental Protection Act, 1971, s. 33a; The Ontario Water Resources Act, s. 43, s. 61.

172 The Environmental Protection Act, 1971, s. 33c; The Ontario Water Resources Act, s. 44.

173 Section 5(3) sets out a general description of the contents of an environmental assessment. Ontario Regulation 835/76 sets out standard forms for hearings under Part I of The Environmental Assessment Act, 1975, including a form for the environmental assessment, and for written submissions to the Minister.

Assessment Act, 1975 to consider these issues.[174] When the Board holds a hearing under this authority, its responsibility is to decide the matters confided to it by the Minister.[175]

Persons seeking approval under The Environmental Protection Act, 1971 and The Ontario Water Resources Act submit application forms and diverse supporting informatin to the Director.[176] Supplementary documentation may include consulting engineering reports, maps, blueprints, diagrams, final engineering drawings, and equipment and performance information. The materials are reviewed and evaluated by the appropriate section[177] of the Environmental Approvals Branch. A recommendation is sent to the Director. If the Director requests a hearing or a hearing is required by statute, the application and documents are sent to the Environmental Assessment Board.

174 The Environmental Assessment Act, 1975, s. 7(2), s. 12(2), s. 13.

175 The Environmental Assessment Board also conducts public hearings pursuant to Orders in Council. The Elliot Lake Uranium Mines Expansion hearings are authorized by O.C. 2681/76 and O.C. 2992/76. The St. Lawrence Cement Co. hearings concerning the use of fuels containing PCB's are authorized by O.C. 527/78.

176 An applicant must submit plans and specifications of the work to be undertaken together with any information required by the Director. The Environmental Protection Act, 1971, s. 8(2), s. 38, s. 58; The Ontario Water Resources Act, s. 42.

177 Three sections process applications -- the Industrial Approvals Section, the Municipal and Private Approvals Section, and the Design and Equipment Section. For further information about their specific duties and responisibilities of each branch see A Guide to the Ministry of the Environment Approval Requirements, supra note 91; and Ont., Ministry of the Environment, Annual Report 1977-78 (Toronto: Ministry of the Environment, 1979) at 28-30.

Proponents under The Environmental Assessment Act, 1975 submit an environmental assessment and supporting documents to the Minister. Ministry staff prepare and coordinate a detailed technical government review of the assessment. Members of the public may submit written submissions to the Minister as well.

Whether there will be public access to information compiled during the environmental approvals process depends on the nature of the specific application. Documents generated in the course of an environmental assessment under The Environmental Assessment Act, 1975 must be made available for public inspection. The Ministry of the Environment maintains a public record[178] of every undertaking for which an environmental assessment has been submitted under the Act, including those for which no hearing is required. Furthermore, the Minister must give public notice when a proponent has submitted an environmental assessment and after completion of the government review.[179]

Under Section 31 of The Environmental Assessment Act, 1975 "where the Minister is of the opinion that ...the desirability of avoiding the disclosure of the matters ... in the interest of any person affected or

178 The Environmental Assessment Act, 1975, s. 7(2).

179 The Environmental Assessment Act, 1975, s. 32. The public record consists of the environmental assessment, a review of the environment assessment that the Minister caused to be prepared, any written submissions, a decision of the Environmental Assessment Board or Minister, and any notices under the Act.

in the public interest outweighs the desirability of disclosing such matters to the public", the Minister can make an order limiting disclosure. This authority can be used to impose confidentiality on the otherwise mandatory public record. No such orders have been issued.

Public access to information concerning applications under The Ontario Water Resources Act and The Environmental Protection Act, 1971 depends on whether there is a hearing by the Environmental Assessment Board. If there is a hearing, all information relevant to the application will be available in a hearing record file[180] for inspection and photocopying. All Board hearings have been conducted entirely in public. Thus, there is access to all information and arguments on which a decision of the Director is based.

When the Director makes a decision under The Environmental Protection Act, 1971 and The Ontario Water Resources Act without a hearing, very limited disclosure is compelled by statute. Section 19 of The Environmental Protection Act, 1971 requires the Ministry of the Environment to permit inspection of current orders and approvals of the Director or Minister. A similar requirement does not apply to orders and approvals made under The Ontario Water Resources Act. There

180 A typical file includes an official notice from the Director of the Environmental Approvals Branch requiring a hearing, a copy of the application for approval, notices of hearing by the Board, the official notification list, maps and exhibits, including reports, except those that are returned, transcripts, draft report of the Board member or members conducting the hearing, and the report of the Board to the Director.

is no statutory requirement that the Environmental Approvals Branch afford public access to information upon which a decision to grant approval is based. Whether any information is released depends on the discretion of the Ministry of the Environment.[181]

The Environmental Approvals Branch permits the public to examine approvals, permits, certificates of approval and licences granted by the Director. Copies will be provided at no charge. Whether the rest of a file, including the application, is available depends on its content. To explain how it will protect the environment, an applicant may submit sensitive proprietary information revealing an unpatented process or trade secrets or chemical formulations. If the applicant requests that this information be treated in a confidential manner, the Environmental Approvals Branch will comply. No public access will be permitted to it. Furthermore, the Branch will return the confidential information to the applicant two weeks after the application is approved. If a file does not contain any sensitive commercial information, it will be available. Requests for access are handled by the head of the Branch section that processed the application. If there is a dispute or uncertainty the request will be decided by the Director.

181 The Canadian Environmental Law Association has urged that The Environmental Protection Act, 1971 and The Ontario Water Resources Act be amended to provide for notice of pending applications and public access to government and industry information upon which licences and approvals are based. See Submissions of the Canadian Environmental Law Association to the Standing Committee on Resources Development (February 13, 1979).

The general policy of access is affected by a failure to provide notice of applications. Unless there is a public hearing by the Environmental Assessment Board, there is no statutory requirement in either The Ontario Water Resources Act or The Environmental Act, 1971 that notice of the application be provided. Consequently, members of the public may not be able to avail themselves of the access afforded by the Branch. However if a hearing does precede a decision by the Director, notice of the hearing is given to the clerk of the municipality affected by the application and to the owners and occupants of adjoining lands.[182] Prior notice is often placed in local newspapers.

The Environmental Assessment Board has adopted a policy of openness. Hearing record files may be inspected and no in camera proceedings have been held. At a Board hearing, a party cannot submit supporting information or documents on a confidential basis. Evidence must be exposed to the scrutiny of all parties or not be considered at all. Thus at a hearing an applicant may have to adduce information that he could have protected had his application been decided without a hearing, or risk that his case will fail without its support. Section 19 of The Environmental Assessment Act, 1975 does allow the Board to conduct proceedings in camera. However this power affords little protection to an applicant because the Board, sensitive to public accountability, permits generous public participation in hearings. To exclude

182 The Environmental Protection Act, 1971, s. 33a, s. 33c; The Ontario Water Resources Act, s. 43(1), s. 44(1), s. 61(4).

participants would cause severe public criticism. Moreover, it is doubtful that section 19 authorizes the removal of parties.

The only problem respecting party access concerns the timeliness of disclosure. The relevant statutes do not provide for exchange of documentary and other information prior to the hearing. Nor does the Board require it as a matter of practice.[183] Representatives of the Environmental Law Association noted that parties are sometimes presented with lengthy, complex exhibits and documents at the commencement of the hearing. There is insufficient time to study them and prepare for the hearing. This could be rectified if exchange of information was required prior to the hearing. This procedure has been adopted in Stage II of the Main Hearing on the Elliot Lake Uranium Mines Expansion.[184]

An appeal from a decision of the Director of the Environmental Approvals Branch or a local health unit may be taken to the

183 For hearings under The Ontario Water Resources Act and The Environmental Protection Act, 1971, the Board may determine its own practice and procedure for hearings, and with the approval of the Cabinet, may make rules governing practice and procedure (The Environmental Protection Act, 1971, s. 33d; The Ontario Water Resources Act, s. 9a). The Board has the same power for hearings under The Environmental Assessment Act, 1975 except that the approval of both the Cabinet and Statutory Powers Procedure Rules Committee is required (The Environmental Assessment Act, 1975, s. 18(12)).

184 See Guidelines for Stage II of the Main Hearing, at 4-5. Also the Order in Council ordering the hearing concerning the St. Lawrence Cement Co. (O.C. 527/78) requires that a summary of expert evidence be filed at least 15 days prior to the expert being called as a witness.

Environmental Appeal Board.[185] The Board is a tribunal dependent on the participating parties to furnish information necessary to a decision. All hearing record files[186] maintained by the Board are public. Since its inception, the Board has conducted proceedings in camera during two hearings to prevent the disclosure of business information. Unfortunately, detailed information about the circumstances of these cases was unavailable. Apparently the Board heard in camera evidence about the financial status of a company that was almost bankrupt. Similar evidence was offered in camera when a company argued that it was unable to obey a control order due to its precarious financial position. The former Chairman has also refused to issue summonses to compel production of detailed financial information about an appellant company.

185 The Environmental Protection Act, 1971, s. 78, s. 79; The Ontario Water Resources Act, s. 79. During the 1977-78 fiscal year, most appeals concerned decisions of the Director or local health units about private sewage systems. Other hearings dealt with decisions about waste disposal sites, sewage and water works and the emission of various contaminants. Annual Report, 1977-78, supra note 177, at 64.

186 A typical file contains the following documents: Notice of Appeal, the document that is subject of the appeal (i.e. the order or certificate of approval); Notice of Hearing; the transcript; the exhibits if any; decision of the Board, and a list of parties notified about the appeal.

C. Registrar of Motor Vehicle Dealers and Salesmen, and the Commercial Registration Appeal Tribunal

A person wishing to carry on business as a motor vehicle dealer or salesman must be registered under The Motor Vehicle Dealers Act. The The Registrar of Motor Vehicle Dealers and Salesmen is an administrative official in the Business Practices Division of the Ministry of Consumer and Commercial Relations. His responsibilities are to decide applications for registration and renewal of registration, and to supervise the conduct of motor vehicle dealers and salesmen.

An applicant for registration must submit prescribed forms[187] intended to provide information about his financial responsibility and character.[188] The forms require disclosure of personal and financial information not otherwise a matter of public record. For example, an applicant must identify any person or corporation who has a financial interest in the applicant, or who otherwise exercises control or direction over the applicant.[189] The names, addresses, occupations, and the nature and extent of share ownership of all shareholders must be revealed. In the case of a private company, such information is not publicly available.

187 O. Reg. 98/71.

188 The Motor Vehicle Dealers Act, s. 5.

189 O. Reg. 98/71, Form 1, question 12.

When an application is submitted, the Business Practices Division requests a copy of the applicant's police record from the Ontario Provincial Police. The Registrar may compel a motor vehicle dealer to file a financial statement.[190]

Additional information may be collected in the course of supervising the activities of motor vehicle dealers and salesmen. The Registrar has power to require an applicant or registrant to submit further information and may demand verification of information previously submitted.[191] If a consumer complaint is received, the Registrar may demand information from the motor vehicle dealer or appoint a ministry inspector to examine the business premises.[192] Inspections may also be ordered to ensure compliance with the legislative requirements governing the maintenance of trust accounts and the necessity of registration.[193] The reports of inspections may be in narrative form or follow prescribed forms.

Extensive powers of inspection[194] permit seizure of business records for the purpose of making file copies of them. A variety of documents

190 The Motor Vehicle Dealers Act, s. 29.

191 O. Reg. 98/71, s. 13(10).

192 The Motor Vehicle Dealers Act, s. 22.

193 Id., s. 23.

194 Id., s. 24.

may be taken including accounting records, invoices, receipts, contracts and bank records.

According to statute,[195] all information in possession of the Registrar and his staff must be kept confidential. It may be disclosed only with the consent of the person to whom the information relates or if necessary to the administration of the legislation. Consequently there is no public access to files. However, an inquiry as to whether a person is registered under the Act can be made by telephone to the Central Registry. This is the only information disclosed to the public by the Business Practices Division.

Information is transferred within the Ministry of Consumer and Commercial relations without knowledge[196] of the subject. If a person or corporation formerly registered under The Motor Vehicle Dealers Act applies for registration under another statute administered by the Business Practices Division, inquiries concerning the applicant may be made to the Registrar of Motor Vehicle Dealers and Salesmen.

195 Id., s. 25b. See note 12, supra.

196 It is unlikely that an applicant would be aware that information about him was passed to another Registrar if the second application was approved. He is taken to know that certain checks on his background would be made because section 13(2) of O. Reg. 98/71 provides that registration is conditional for a period of sixty days following registration pending verification of the application. Should the second application be questioned by a Registrar, the applicant may be informed that a reason for doubt is the information received in the file from another registrar. However he will not necessarily be informed.

Usually the information is provided orally, although special circumstances may necessitate transfer of a file or documents. The legislation does not expressly permit this disclosure. However the former Registrar stated that the exchange of information did not violate section 25b of The Motor Vehicle Dealers Act because it was considered to be "required in connection with the administration of [the] Act." Moreover he contended that disclosure is necessary to protect the public.[197]

The Registrar does not allow an applicant or registrant to examine the contents of a file. If there is a question about the conduct of a dealer or salesman, the Registrar may discuss the matter with him at an informal interview, during which he may discuss an inspection report or other information. However there is no "right" to any information until a registrant or applicant requests a hearing by the Commercial Registration Appeal Tribunal. A hearing may be required when the Registrar proposes to refuse to grant or renew or proposes to suspend or revoke a registration.[198] Before it commences, the Registrar must afford an applicant or registrant "opportunity to examine ... any written or documentary evidence that will be produced

197 Letter from Mr. R.G. MacCormac, June 8, 1978.

198 Proposals are made very infrequently. During 1977, the Registrar received 3413 applications from dealers and salesmen. During that period he issued 84 proposals including 14 revocations, 8 suspensions, and 27 refusals. The remaining 35 proposals imposed terms and conditions on registrants. Letter from Mr. R.G. MacCormac, June 8, 1978.

or any report the contents of which will be given in evidence at the hearing."[199] This is a limited disclosure requirement intended to allow sufficient preparation. It is not equivalent to a discovery right as it does not compel production of all relevant information concerning the applicant or the pending dispute. Only documents that will be presented at the hearing must be revealed.

Greater disclosure may be advantageous to an applicant or registrant. Files may contain inconsistent witness statements or inspection reports showing compliance that could allow a better case to be presented before the Tribunal.

The Commercial Registration Appeal Tribunal conducts hearings[200] under thirteen statutes[201] administered by the Ministry of Consumer and Commercial Relations. It has no investigative powers and depends on the participating parties for information.

199 The Ministry of Consumer and Commercial Relations Act, R.S.O. 1970, c. 113, s. 9a(3)(b).

200 The Tribunal also has a statutory duty to advise the Ministry of Consumer and Commercial Relations on consumer affairs. The Ministry of Consumer and Commercial Relations Act, s. 7(2)(a). This appears to be a minor responsibility as the permanent members of the Tribunal only meet quarterly for this purpose.

201 The Bailiffs Act; The Motor Vehicle Dealers Act; The Consumer Reporting Act, 1973; The Consumer Protection Act; The Paperback and Periodical Distributors Act; The Business Practices Act, 1974; The Collection Agencies Act; The Travel Industry Act, 1974; The Mortgage Brokers Act; The Real Estate and Business Brokers Act; The Upholstered and Stuffed Articles Act; The Ontario New Home Warranties Plan Act, 1976, S.O. 1976, c. 52; The Credit Unions and Caisses Populaires Act, 1976, S.O. 1976, c. 62.

The files maintained by the Tribunal reflect its primarily judicial character. A hearing record file, referred to as the "correspondence file" contains the documents generated in the course of the hearing.[202] Its Decision and Orders have also been collected in separate binders. Exhibits are filed separately. However, since exhibits are usually retrieved by the parties after the time for appeal has elapsed, few exhibit files exist. Other files contain administrative information -- internal memoranda about accommodation and hearing dates, personal information about Tribunal members, and members' hearing notebooks.

The Tribunal permits public examination of exhibit files, its decision and orders, and correspondence files after the hearing. Reasons for the confidentiality of the remaining files were explained by the Chairman. The secrecy of the administrative files is intended to protect the personal privacy of Tribunal members. The policy preventing access to the correspondence file prior to the hearing follows from section 9a(2) of The Ministry of Consumer and Commercial Relations Act which forbids Tribunal members from any investigation or consideration of the subject matter of the hearing before a hearing. Since access is denied to Tribunal members to ensure a fair hearing, it is generally forbidden. This practice is not a serious impediment to public access because the file will be available for public inspection after the hearing.

202 The typical file includes a form of notice requiring a hearing, Notice of Hearing, proof of service of the Registrar's proposal and a Decision and Order.

The Tribunal has otherwise conducted its business in an open fashion. It has held only one in camera hearing since 1970. The circumstances were that a registrant motor vehicle dealer was planning to discontinue business in a small community. Since the publicity caused by an open hearing would not allow him to liquidate his inventory except at distress prices, the proceedings were conducted in camera.

There is no issue of party access to information from the Tribunal because its role is essentially judicial. If further information is necessary, it would be required from the opposing party, the Registrar who has refused or cancelled registration.

D. Ontario Highway Transport Board[203]

The Ontario Highway Transport Board regulates the highway transportation of goods and persons under The Public Commercial Vehicles Act, The Public Vehicles Act, and The Motor Vehicle Transport Act (Canada).[204] Various responsibilities have been assigned to the Board, the most important of which are fulfilled at public hearings. Its primary task

203 The Board has undertaken an intensive internal review that may alter some of the practices described in this section. See, Ministry of Transportation and Communications, Press Release, "Review of OHTB administrative procedures now underway", Sept. 27, 1978.

204 R.S.C. 1970, c. M-14.

is to determine whether applications for operating licences should be approved on the ground that public necessity and convenience warrant their issue by the Minister of Transportation and Communications.[205] Hearings are held to decide whether freight forwarder's licences should be issued on the same basis.[206] When the Minister refers the matter, the Board conducts hearings concerning the transfer[207] or renewal[208] of licences, or to review their terms and conditions.[209] If the Minister proposes to cancel or suspend an operating licence or a freight-forwarder's licence, the applicant or licensee may require a hearing after which the Board makes recommendations to the Minister.[210] The Board holds hearings under The Public Vehicles Act to recommend whether it considers a proposed tariff of tolls fair and reasonable.[211]

Some Board decisions are internal administrative decisions ("in chambers") made without a hearing. When there is no objection to an

205 The Public Commercial Vehicles Act, s. 5, s. 6; The Public Vehicles Act, s. 3, s. 4.

206 The Public Commercial Vehicles Act, s. 12e.

207 The Public Commercial Vehicles Act, s. 7; The Public Vehicles Act, s. 5.

208 The Public Vehicles Act, s. 4(3).

209 The Public Commercial Vehicles Act, s. 8; The Public Vehicles Act, s. 5(6).

210 The Public Commercial Vehicles Act, s. 12i; The Public Vehicles Act, s. 9g.

211 The Public Vehicles Act, s. 11.

application,[212] or there is an application for temporary or interim operating authority,[213] the Board often disposes of the application in this summary manner.

The information collected by the Board varies with its specific task. Applicants for operating and freight forwarding licences submit prescribed application forms.[214] During the hearing, they may present documentary and other evidence in support of the application. A party may adduce maps of existing and proposed routes, lists of equipment and terminals, photographs, or samples of advertising to demonstrate ability to provide adequate service. Bills of lading and pro-bills may be offered in evidence by shipper witnesses.

Carriers wishing to oppose the entry of a competitor must serve the applicant with a Notice of Objection and file it with the Board at least 15 days before the date of the hearing.[215] At the hearing, they may offer documentary evidence as a part of their cases.

212 R.R.O. 1970, Reg. 632, s. 8.

213 Temporary authority is normally granted for a fixed period to meet a non-recurring need. Interim authority is usually granted pending a decision on an application for permanent authority, at which time it expires. Final Report of the Select Committee on Highway Transportation of Goods, supra note 71, at 59.

214 R.R.O. 1970, Reg. 700, Form 11, Form 12; R.R.O. 1970, Reg. 762, Form 1.

215 R.R.O. 1970, Reg. 632, s. 5.

Applicants for temporary and interim authority must submit the standard application forms with affidavits attesting to the necessity of the service in issue.

An application for a transfer of an operating licence[216] must be accompanied by a copy of the agreement between the licensee and the applicant and a statutory declaration.[217]

On occasion the Board does gather more sensitive business information. A Board member hearing a case may require a party to submit a financial statement if its financial viability is in issue. On an extra-provincial application, a financial statement must always be filed with the application form. Some carriers apparently file financial statements voluntarily without request from the Board.

Before a carrier can charge a toll for its services, it must file a tariff of tolls.[218] A licensee under The Public Commercial Vehicles Act files its tariff with the Board. Licensees under The Public Vehicles Act file tariffs with the Highway Carrier Licensing Office,

216 R.R.O. 1970, Reg. 700, Form 13; R.R.O. 1970, Reg. 762, Form 4.

217 A copy of the agreement must cover the sale of the business, equipment, vehicles and vehicle licences. A statutory declaration must show any liabilities of the licensee and how they are to be liquidated. R.R.O. 1970, Reg. 700, s. 7; R.R.O. 1970, Reg. 762, s. 4.

218 The Public Commercial Vehicles Act, s. 12j(2); The Public Vehicles Act, s. 10(1).

Transportation Regulation Division of the Ministry of Transportation and Communications.

Generally the Board has an open access policy. Files[219] may be examined upon completion of a simple request form obtained from the Board Secretary. Public commercial vehicle tariffs may be inspected at a separate rate file office in the same building. Financial statements however are excluded from this policy. They are filed[220] separately and are not available for public examination. This policy is a consequence of an entrenched practice long recognized by the Board and the carriers. When applicants file the statements during a hearing, they understand that they are submitted on a confidential basis. Board policy respects this assumption and, in a sense, implicitly acknowledges a degree of commercial privacy.

Two board practices affecting access should be noted. Files contain exhibits only until the expiry of the time for appeal from a Board decision. They are then mailed to the parties. No copies are retained in the file due to the storage costs. The Board charges substantial

219 A typical file contains application form, related affidavits and other ancillary documents, correspondence, perhaps a notice of objection, the decision of the Board with reasons if requested.

220 A financial statement file may contain copies of the statements, related correspondence, and possibly a statutory declaration as to its origin.

fees[221] for photocopying services, exceeding those levied by other boards and tribunals.

Evidence considered by the Ontario Highway Transport Board is subject to the scrutiny of all parties. If a party needs better information to advance its case, it would be required from its adversary at the hearing, not from the Board. The Board depends on the parties to provide relevant information to decide the issues and gathers none on its own initiative. If the hearing concerns the cancellation or suspension of an operating licence, the Ministry must afford "an opportunity to examine before the hearing any written or documentary evidence that will be introduced or any report the contents of which will be given in evidence at the hearing."[222] It fulfills this requirement by allowing an applicant or licensee to examine documents at the Ministry offices. Only documents that will be offered in evidence are subject to inspection.

The Board has conducted the overwhelming majority of its hearings entirely in public. Proceedings have been conducted in camera only during the cross-examination of a witness about a financial statement.

221 The Board charges $2.00 for the first page, $1.00 per page for the next four pages, and 25¢ per page for each subsequent page.

222 The Public Commercial Vehicles Act, s. 12i(8); The Public Vehicles Act, s. 9g(7).

With the exception of the applicant, the parties, other witnesses and spectators are removed from the hearing room. Only the lawyers and the hearing members remain. Parties are excluded because, in the context of an Ontario Transport Board hearing, disclosure of a financial statement to an opposite party is often disclosure to a competing carrier. Allowing a competitor to learn about its financial status could cause commercial harm to the party submitting the statement. The lawyer representing the party adducing the financial statement will request an undertaking that it not be disclosed from the opposing counsel. The undertaking will be noted on the record. Since this practice is generally understood, the presiding Board members have not needed to require undertakings from participating lawyers. The Board has been able to rely on informal procedure because very few lawyers practice before it. Consequently they are very familiar with each other and Board procedures. If new lawyers enter their ranks, the Board may have to establish formal procedures to ensure the confidentiality of the financial statements.

Recent debate has concerned the sufficiency of disclosure of information prior to hearings.[223] The controversy has centred on the possibilities

223 Final Report of the Select Committee on Highway Transportation of Goods, supra note 71, at 50-54, 63. Also see M.P. Forestell, Q.C., Brief to the Select Committee. During interviews, several members of the Transport Bar suggested that greater pre-hearing disclosure by the parties would improve efficiency by narrowing issues and discouraging spurious applications. The application form used by the Interstate Commerce Commission was cited as an example of desirable disclosure.

of increased disclosure by opposing carriers in the context of contested applications. It has not been a question of access to government information.

E. Assessment Review Court

The Assessment Review Court[224] is responsible for hearing and determining complaints against real property assessments[225] made by the Assessment Division of the Ministry of Revenue.

Any information possessed by the Court is submitted by the parties appearing before it at the hearing. The parties, usually a complainant and the Ministry of Revenue, must submit standard procedural documents and may support their cases by exhibits or other documents. No information is collected by the Assessment Review Court independent of the hearing.

The typical file contains only a few standard documents,[226] including an internal summary record. Despite their innocuous character, the files of the Assessment Review Court are not generally available for

224 The Assessment Review Court Act, 1972, S.O. 1972, c. 111.

225 The Assessment Act, R.S.O. 1970, c. 32, s. 52.

226 A file contains Notice of Assessment, Notice of Complaint, Notice of Hearing, and the Assessment Review Court Record.

public inspection. This policy is subject to the discretion of the Chairman who may permit examination of files in certain circumstances. Apparently a person interested in ascertaining the outcome of disputes about properties similar to his own may be afforded access.

The same policy governs the availability of Court decisions when reasons are given. They may be obtained only with the consent of the Chairman.

The reasons for this restrictive policy are unclear. It is not based on the sensitivity of the information as that information is otherwise publicly available on municipal assessment rolls. The policy appears to be the consequence of two factors. Firstly, the policy was inherited by the Assessment Review Court from its predecessor, the Courts of Revision, when it assumed responsibility for assessment appeals, and has since been followed without any inquiry. Secondly, underlying it is an apprehension that an open policy will encourage a large volume of requests with concomitant financial and labour costs.

The Assessment Review Court has conducted hearings in camera during the presentation of sensitive business information. Although the frequency of requests has recently increased, there have still been so few that a settled policy has not yet been developed. Generally the procedure is that a lawyer or agent wishing to present evidence in camera requests confidential treatment at the inception of the hearing. If the request is accepted, spectators and clients are excluded from

the hearing room. Only Court officials and the lawyers or agents remain. The lawyers are not required to give express undertakings not to communicate the information to their clients. The Court believes that there is an implicit understanding to this effect, reinforced by an awareness that the presiding Court member has noted that the evidence has been submitted on a confidential basis.

This confidentiality issue has arisen as a consequence of the method of real property assessment required by The Assessment Act. Part of the province is assessed at market value.[227] The rest is assessed at a percentage of market value based on a comparison with the assessed value of similar real property in the vicinity of the assessed property.[228] Regardless of which basis of assessment is used, for many kinds of commercial properties such as apartments, hotels and shopping centres, value reflects income earning ability or potential. Documents and information going to the issue of income are generally considered confidential and kept secret by business enterprises. However, to value a hotel, it may be necessary to produce documents and other evidence showing marketing schemes, future plans, costs and expenses, labour contracts, and financial and pro forma statements. In a hearing concerning a shopping centre assessment, it may be essential to adduce individual leases, which would of course reveal

227 The Assessment Act, s. 27. Several areas have been put under market value assessment by proclamation of the Lieutenant Governor.

228 Id., s. 90.

their terms, including any special inducements offered by landlords to preferred tenants. Disclosure of this kind of information to competitors would grant them a strategic advantage over the complainant.

Either party may have gathered sensitive business information to prepare its case. A commercial complainant challenging the assessment may be forced to adduce income and business information otherwise unavailable to the public or competitors. The Ministry of Revenue may collect sensitive income information about businesses similar to that of the complainant because the basis of assessment is similar properties. Without this information, a proper assessment cannot be made. Although the Ministry of Revenue has coercive power to acquire it,[229] it usually obtains the necessary information with voluntary compliance. Persons who cooperate understand that the confidentiality of the information will be protected. Furthermore, section 78 of the Act makes it an offence for an assessment commissioner or assessor to disclose it except during an assessment hearing. Representatives of the Ministry of Revenue contend that if the Ministry did not assure that confidentiality would be preserved, information of the character and detail necessary to properly assess similar properties would not be available even with their compulsive powers.

229 Section 13(2) of The Assessment Act provides that one must provide "... all the information in his knowledge that will assist ... to make a proper assessment". Section 16 makes it an offence if information is not furnished, or if false information is knowingly provided.

The conduct of proceedings in camera protects sensitive business from the general public and the opposing party. Another confidentiality problem is currently in issue. A complainant may want business information about comparable properties that has formed the basis of its assessment by the Ministry of Revenue. Although the Ministry may reveal information, it is reluctant to do so because disclosure would end subsequent cooperation crucial to effective assessment. Consequently the Ministry does not reveal all information on which the assessment is based. This creates a problem of party access as the complainant may not be able to comprehend fully the method of assessment in issue without it.

F. Milk Commission of Ontario and the Ontario Milk Marketing Board

The Milk Commission of Ontario, the Ontario Milk Marketing Board, the Ontario Cream Producer's Marketing Board, and the Milk Industry Section of the Farm Products Quality Branch of the Ministry of Agriculture and Food[230] share responsibility for the comprehensive regulation of the

230 The Ministry of Agriculture and Food Statute Law Amendment and Repeal Act, 1978, S.O. 1978, c. 100, has added a new actor to the regulatory framework. It created the Farm Products Appeal Tribunal, to assume responsibility for appeals from determinations of inspectors, the Ontario Milk Marketing Board, the Commission and the Director of the Milk Industry Section made under The Milk Act, The Edible Oil Products Act, R.S.O. 1970, c. 138, and The Oleomargarine Act, R.S.O. 1970, c. 304. This was formerly a responsibility of the Milk Commission. In 1973, many of the (cont'd)

milk industry in Ontario. The Milk Act[231] gives the Milk Commission extensive duties and powers and authorizes their delegation to the Ontario Milk Marketing Board. The Commission has in fact conferred many powers on the Ontario Milk Marketing Board,[232] but nonetheless remains responsible for their exercise. One of its primary functions, then, is supervisory. The Milk Commission also conducts research and develops policies to stimulate and improve the production, processing and marketing of milk and milk products.[233] It participates in policy-making by making regulations and through discussions with the marketing boards, the Ontario Dairy Council and the Ministry of Agriculture and Food. The Commission also licenses cheese buyers[234] and administers the Fund for Milk and Cream Producers.[235]

The Milk Commission does not permit public access to files. This restrictive policy follows from two distinct concerns, each underlying different kinds of files. Those that include information and advice

230 (cont'd) Commission's licensing duties were transferred to the Director of the Milk Industry Branch of the Ministry of Agriculture and Food. O. Reg. 175/73, O. Reg. 176/73, O. Reg. 177/73. As a result of a recent reorganization, the Milk Industry Branch has become the Milk Industry Section of the Farm Products Quality Branch.

231 R.S.O. 1970, c. 273.

232 R.R.O. 1970, Reg. 595, s. 4, s. 5, s. 6.

233 The Milk Act, s. 4.

234 O. Reg. 92/76.

235 The Farm Products Payment Act, R.S.O. 1970, c. 163; R.R.O. 1970, Reg. 348.

generated during policy-making[236] are secret because confidential discussions are believed essential to effective policy formulation. It is argued that disclosure may discourage the necessary candour among civil servants or prematurely expose ideas only partially evolved. Information gathered in the administration of the Fund and through licensing cheese buyers is confidential because it is of financial nature. This policy is intended to protect the privacy of individual file subjects.

The purpose of the Fund for Milk and Cream Producers is to guarantee payment to milk and cream producers. The Fund is supported by contributions from the Milk Marketing Board and fees levied against the milk processors. If a processor does not pay the Ontario Milk Marketing Board within a specified period, the Board or an individual producer may make a claim against the Fund. To administer the Fund, the Milk Commission secures information about the credit rating of individual milk processors. Its files include financial statements and other evidence of financial responsibility submitted by processors.[237]

The Milk Commission conducts informal hearings to consider proposed changes to the milk regulations. Although any person may request that

236 The Commission maintains correspondence files that may relate to policy-making, and separate files for regulation-making and policy decisions.

237 Processors often submit letters from banks attesting to their financial state.

the Commission reconsider a regulation, they have usually been made by the Ontario Milk Marketing Board or the Ontario Dairy Council rather than individuals. Notice of suggested amendments is sent to all persons potentially affected by the change, informing them about the proposal, and the date and place of the hearing. The hearings are actually informal discussions conducted in the Milk Commission board room, not formal judicial proceedings. However they are open to the public and the final decisions are sent to the Press Gallery.

The Ontario Milk Marketing Board is a milk producer organization whose members are elected by the producers of the region each represents.[238] The Board engages in diverse activities intended to improve the income of producers and to promote a stable market. It undertakes research, encourages the sale of milk and milk products, and makes important policies.[239] The Board supervises the marketing of cheese. A primary responsibility is market regulation of milk through the development and administration of quota policies. For the purpose of this paper, it is unnecessary to examine the content of these policies. What must be understood is that the Board develops and administers quota policies

238 The Lieutenant Governor in Council must appoint to the marketing board every person elected by the producers of the region. (R.R.O. 1970, Reg. 597, s. 6) A consequence of this requirement is that all regulations passed by the Ontario Milk Marketing Board must be published in The Ontario Gazette.

239 See Chapter ix, infra.

for both fluid (Grade A) milk and manufacturing or industrial milk.[240]

The nature and extent of information gathered by the Ontario Milk Marketing Board reflects the basic aspects of the quota system. All fluid and industrial milk produced in Ontario must be bought and sold through the Marketing Board.[241] Milk producers have either a quota for fluid milk or industrial milk or a quota for both. Each milk processor obtains milk from milk producers assigned to him by the Marketing Board.[242] Milk is transported from producer to processor by persons who are appointed as agents for that purpose by the Marketing Board.[243] Thus, the marketing structure has three participants -- producer, processor, transporter -- from or about whom information must be gathered to ensure its equitable and efficient operation. The crucial information is the quantity of milk produced by individual producers and processed by each processor. It determines the return of producers and the monies collected by the Board from processors.

240 Manufacturing or industrial milk is milk used to manufacture other dairy products, such as butter, cream, skim milk powder. The price paid to milk producers depends on the end use of the milk sold to the processors by the Ontario Milk Marketing Board. Milk Classifications based on end use are set out in O. Reg. 230/78.

241 O. Reg. 189/78, s. 3, s. 4; O. Reg. 190/78, s. 4, s. 5; R.R.O. 1970, Reg. 592, s. 3.

242 O. Reg. 189/78, s. 7; O. Reg. 190/78, s. 7.

243 R.R.O. 1970, Reg. 592, s. 7.

The Board licenses milk producers.[244] To obtain a licence, an applicant must supply limited information. Although the Marketing Board may inquire into the financial responsibility of applicants, it does not compel submission of any business information. Its sole concern is that producers' premises and equipment comply with the regulations.[245] Information about a producer's daily production is filed with the Board by processors and transporters.

Milk processors must submit information about the amounts of milk received from producers. A milk collection report and a milk collection summary is sent to the Marketing Board by each processor on the day after he takes delivery of milk.[246] After each month, a milk utilization report is submitted describing how the milk has been used. This information is necessary because the price of industrial milk varies with its particular end-product. The information gathered by the Board allows it to compute correct payment due from processors and the amounts owing to producers.

244 O. Reg. 194/78.

245 Inspectors from the Milk Industry Section of the Ministry of Agriculture and Food examine a producer's equipment and premises to ensure compliance with the regulations. If the producer does not meet the requisite standards, the inspector will inform the Marketing Board.

246 O. Reg. 189/78, s. 18, s. 19; O. Reg. 190/78, s. 16, s. 17.

In its supervision of cheese marketing,[247] the Board demands very limited information from cheese producers. A monthly statement concerning the quantity of cheese production must be sent to the Board. If the producer manufactures ungraded cheese, information about the weight of cheese produced must be forwarded to the Board on a weekly basis.[248]

The Board compiles information about milk transporters necessary for efficient distribution of routes and for correct payment of individual transporters according to the Bulk Milk Transport Formula. For each transporter, it maintains a record of the routes, the producers whose milk is carried, and the quantity of milk transported.[249]

Several kinds of files are maintained by the Marketing Board. An individual file for each producer records milk production on a daily basis. A central file for each producer, processor and transporter doing business with the Board contains information collected from or about the individual through the application and periodic reports to the Board. Information about a producer's quota is found in this file.[250]

247 O. Reg. 93/76.

248 O. Reg. 94/76, s. 3, s. 4.

249 O. Reg. 193/78.

250 For example, a central file could contain a producer licence and all material relevant to obtaining it; quota share; correspondence with the individual; collection reports; material submitted for hearings and during negotiations with the Marketing Board.

The Board also maintains an alpha listing of the names and addresses of producers, processors and transporters. It utilizes a computer to operate a central milk payment system to producers, and payment to cheese producers and transporters.

There is no public access to this information. This policy follows from an acute concern for the personal privacy of the individuals about whom files are kept. If there was access, one could determine the income of producers, processors, and transporters from their activities in the milk industry because the price of raw milk and the Bulk Milk Transport Rate formula are publicly available. However one could not ascertain profit because no information about costs or expenses is filed. Nor does the Board gather any information concerning the financial state of persons whom it regulates. In a sense, then, the Board is protecting limited information.

That the milk producers favour a policy of confidentiality is clear. Formerly the Marketing Board periodical, Ontario Milk Producer, publicized transfers and sales of milk quotas. At the request of the milk producers, this practice was discontinued. No information about individual quotas is currently available. Other Ontario agricultural marketing boards adhere to similar policies with respect to production and income information.[251]

251 D. Williamson, "Farm boards oppose releasing information to Tax Officials", Windsor Star, November 19, 1978.

Although the Marketing Board's policy may be justifiable on the basis of privacy, it is doubtful whether it can be supported in its application to producer files by an apprehension that commercial harm would ensue from disclosure. The distribution of the market among milk producers is strictly controlled by the Marketing Board and not subject to competition. Knowing a producer's quota would not affect another's market share. However, exposing processor files could result in competitive detriment because the processors compete in a highly competitive market. Since each file indicates the quantity of a given class or classes of milk being processed, disclosure would be highly advantageous to competitors. For example, one could easily discover when a processor had decided to enter a new market by manufacturing new products because the class of milk received would change.[252]

The confidential policy towards identifiable information contrasts with an open policy respecting general information about the Board's activities. Both the general report of its operations for the year and the annual financial statement with the report of an auditor are publicly available.[253] Several brochures have also been provided to explain Board policies.[254] The availability of the minutes of Board

252 Telephone conversation with Mr. Brian Kipping, Executive Director, Ontario Dairy Council, March 29, 1979.

253 The Board publishes a very comprehensive annual report. The regulations require that it be sent to each producer within six months after the end of the Board's fiscal year. R.R.O. 1970, Reg. 580, s. 17.

254 Supra note 89.

meetings has not been settled by a general policy. Since a single meeting may discuss a number of diverse matters ranging from prospective policies to specific disciplinary problems, the Board prefers to consider requests to examine minutes on an individual basis. If it is persuaded that a request is justified, it will provide a copy of the relevant extract.

The question of public access to Marketing Board hearings is uncertain. Most hearings have been reconsiderations of decisions about individual producer quotas. Hearings have also been held to determine disputes between transporters or producers and to consider disciplinary measures against transporters or producers. Reconsideration "hearings" have usually been conducted in an informal manner, unless the producer attends with his lawyer. The Board has found this procedure less intimidating and more comprehensible to the producers. When two opposing parties appear before the Board or during a disciplinary proceeding, the Board resorts to a formal hearing.

The Board secretary noted that to date there had been no requests to observe hearings from either the press or members of the general public. If a person wished to attend, the Board would ascertain why he wanted to be present and seek advice from its counsel. This cautious attitude reflects the Board's uncertainty about how to reconcile the notion of public hearings with its general concern about personal privacy. Although the Board's reticence may be understandable in the absence of clear guidelines, it has apparently contributed to

a presumption that hearings are to be held in camera unless the Marketing Board is persuaded otherwise. If, in fact, this is the present position, it should be reversed. Section 9 of The Statutory Powers Procedure Act, 1971 requires that hearings be conducted in public unless certain circumstances are present. A concern for public accountability should also dictate that the Board presume its hearings be open rather than closed.

G. Ontario Energy Board

The Ontario Energy Board regulates privately owned gas utilities within Ontario and gives advice about proposed changes in Ontario Hydro rates and on other issues. Numerous duties have been conferred upon the Board by The Ontario Energy Board Act and The Municipal Franchises Act.[255] Most of them must be discharged at public hearings[256] after

255 R.S.O. 1970, c. 289. Under sections 8, 9 and 10 of The Municipal Franchises Act, the Board approves the terms and conditions of municipal gas distribution franchises at public hearings. During the fiscal year ended March 31, 1977, 40 gas franchises were approved. Ontario Energy Board, Seventeenth Annual Report (Toronto: Ontario Energy Board, 1977) at 6, 25-27. Generally these hearings are very brief (10 minutes).

256 Section 15(4) of The Ontario Energy Board Act requires that Board proceedings be open to the public. However the Board may make an order or proceed without a public hearing in certain circumstances. The Ontario Energy Board Act, s. 15(2), s. 19(11), s. 22(2), s. 23, s. 38(3).

which the Board either issues an order[257] or submits an advisory report to the Minister of Energy, the Minister of Natural Resources or to the provincial Cabinet.[258] Although the focus of its regulatory activities is the hearing, the Board also engages in general supervision of the gas companies with a particular concern for their sound management and financial responsibility. In its continuous oversight and during hearings, the Ontario Energy Board collects substantial business information from the gas utilities and Ontario Hydro.

Gas utilities regularly file certain financial information for examination by the Energy Returns Officer[259] and financial analysts under his direction. Much of the information is submitted voluntarily. However some data is filed under compulsion of Board orders that have been issued following hearings.

Each gas transmitter, distributor and storage company having an annual revenue exceeding $1,000,000 from approved rates must maintain a

257 Where a proceeding before the Board commences by the filing of an application, the Board must proceed by order. The Ontario Energy Board Act, s. 13(2). A number of decisions must be made by order. The Ontario Energy Board Act, s. 19, s. 21, s. 22, s. 24, ss. 39-41.

258 The Ontario Energy Board Act, s. 23, s. 26, s. 36(2), s. 37a.

259 The Energy Returns Officer is an officer of the Board possessing extensive powers to compel documents and testimony relating to the business of gas transmitters, distributors and storage companies. The Ontario Energy Board Act, ss. 49-56. The current Energy Returns Officer is also the Manager of Financial Analysis.

uniform system of accounts conforming to the regulations.[260] Accountants on the staff of the Energy Returns Officer audit these accounts as directed by the Board or at the discretion of the Energy Returns Officer.[261] Periodically, the Board requests its accountants to conduct a special audit. For example, if the ownership or control of a utility has been transferred to persons unfamiliar to the Board, it may order an audit to evaluate their management. Utilities also submit a statement of source and application of cash at the request of the Energy Returns Officer. Union Gas Limited files a three-year projection of its operating and maintenance expenses and a five-year forecast of its capital expenditures annually under section 55 of The Ontario Energy Board Act. Since the gas companies cooperate and file the information, the Energy Returns Officer has not yet relied on his broad powers of entry and seizure to compel production of documents and records.

After hearings, the Board has issued orders compelling the submission of certain business information. Some utilities have been required to file annual forecasts of expenses and capital expenditures for specified time periods. As a consequence of Board decisions, some

260 R.R.O. 1970, Reg. 628.

261 Audits are done on the accounts of the Consumer's Gas Company, Union Gas Limited, Northern and Central Gas Corporation Limited, Inter-City Gas Limited, and Tecumseh Gas Storage Limited.

utilities file their "range rate contracts"[262] with the Board as the contracts are concluded. Whether these contracts should be confidential has been a difficult issue for the Board.[263] Although the gas industry is substantially regulated, some gas distributors have been allowed to negotiate with their large volume industrial and commercial customers within an approved range of rates. Customers would certainly wish to learn what rates are paid by others, particularly if their own rates are at the higher end of the rate continuum. However, corporate customers have also been concerned that public access to their contracts to purchase gas would allow competitors to obtain corporate information normally not otherwise available. The Board is apprehensive that this concern may cause customers to design contracts intended to reveal minimal information to the public, which may deny the Board information necessary for effective regulation.[264]

Board policy governing public access to range rate contracts is inconsistent, reflecting its emergence from individual hearing

262 Although the term "range rates contract" is commonly used, the Board prefers the contracts to be referred to as "negotiated rates within an approved range". Energy Board Ruling Order (E.B.R.O.) 314-II, at 106-107. The propriety of negotiated rates has been discussed in several decisions. See E.B.R.O. 302-II, at 104-112; E.B.R.O. 309-II, at 27-32; E.B.R.O. 341-II, at 24; E.B.R.O. 343-II, at 32-39; E.B.R.O. 314-II, at 106-113.

263 The Board's concerns were expressed in a submission to this Commission. Ministry of Energy Submission to the Commission on Freedom of Information and Individual Privacy, (August 1977), at 3-6.

264 Id., at 4.

decisions. The contracts of Union Gas[265] and Northern and Central Gas Company[266] are available for public examination and may be secured for inspection from the Rates Manager. Northern and Central must also file a synopsis of each contract in a form approved by the Energy Returns Officer.[267] Consumer's Gas contracts are currently confidential. When the Board has ordered contracts to be made public, it has done so in the belief that disclosure was in the public interest and would not be to the competitive disadvantage of the utility.[268]

Information submitted to the Energy Returns Officer must be kept confidential under section 55 of The Ontario Energy Board Act. Consequently, there is no public access to annual accounts, financial forecasts and the files of the Board's financial analysts.

Hearing files are public. Documents, exhibits and information submitted by an applicant, opposing party, or intervenor are available for public examination immediately upon filing.

The Ontario Energy Board has conducted its hearings in public. Information and documents presented to the Board are subject to the

265 E.B.R.O. 343-II, at 69-70.

266 E.B.R.O. 314-II, at 121.

267 Id., at 119, 122.

268 E.B.R.O. 314-II, at 116-122.

scrutiny of all parties and intervenors. If research studies are prepared by outside consultants or Board staff, they will be considered by the Board only if submitted in evidence during the hearing.

The Board has adopted several procedures conducive to improved openness and better information for the participants and the public. Parties, including intervenors, are required to file their evidence prior to the hearing in the form of "canned testimony." This means that a party files a transcript of the testimony of each witness that would have been given orally at the hearing. Prior knowledge of opposing testimony allows participants to prepare more effective cross-examination. This procedure reduces the amount of time a witness must testify because his evidence-in-chief has already been given. It may also allow a potential intervenor to assess the relevant issues and make an informed decision whether to participate at the hearing.

The Board has developed informal procedures governing the use of written interrogatories by the parties, intervenors and Board counsel. A participant may direct written questions to or request specific documents from another. For each hearing, the Board makes a procedural order establishing the exact procedures, such as when the interrogatories must be filed and answered. If a party refuses to produce a document or answer a question, the Board will make a ruling whether the objection will prevail.

The Board counsel frequently uses written interrogatories. It is the responsibility of Board counsel and the Board's case manager[269] to analyze the application and supporting evidence to ensure that sufficient evidence is adduced to allow the Board to make a sound decision.[270] Counsel's role[271] is that of a "devil's advocate", exposing all points of view so that Board members can make an objective determination with the maximum information. If there is voluminous technical information that will consume many hearing days, interrogatories may be requested to permit advance preparation of cross-examination. The counsel and case manager prepare interrogatories if specific financial data should be prepared by the applicant or to cure other deficiencies in the application.

The Board has initiated the practice of holding pre-hearing conferences in advance of Ontario Hydro references to settle procedural questions

269 The Energy Returns Officer or a member of his staff acts as case manager.

270 Board counsel and the case manager may require their staff to prepare research memoranda about specific hearing issues. If additional expertise is necessary, they retain outside consultants to prepare reports and if necessary, give evidence. Thus, the Board counsel and case manager supervise the collection of information relevant to particular hearings. Whether the information will be made public is subject to their discretion in a limited sense. If a report is presented to the Board, it will be exposed to the parties and the public. The counsel, however, may decide not to adduce the actual report, although his questioning at the hearing may reflect his knowledge of its contents. In this case, the Board may require its filing and public availability if publicity would not cause harm to the company.

271 The role of Board counsel is discussed in the 1978 Hydro Reference. Ontario Hydro Bulk Power Rates for 1978, Hydro Reference (H.R.) 6, at 30.

and to facilitate comprehension of the issues by interested parties. A reference may be divided into discrete stages, each concerned with a different issue or subject matter, so that participants in a lengthy hearing will know when the issues affecting them will be considered. Consequently a party need not attend the entire hearing. Various other matters may be discussed, such as procedures governing filing of interventions or the presentation of evidence. The organizational advantage of pre-hearing meetings has caused the Board to consider extending their use to hearings involving gas utilities.

The Board's tradition of public hearings and other open practices may create an impression that the Ontario Energy Board has not had to deal with claims for business confidentiality. In fact, the Board has considered them in the context of several hearings. What is particularly interesting about the Board's approach is that it has apparently dealt with the issue as a choice between two extremes. The disputed information either must be submitted to the Board and be subject to public exposure; or the data, due to its sensitive character, should not be made public and the Board will not consider it at all, not even in confidence. Although the Board has stated that section 9 of The Statutory Powers Procedure Act, 1971 is sufficient to deal with confidentiality questions,[272] it has not yet resorted to it. That

272 Report on Customer Support for Arrangements to Secure Future Gas Supplies for Ontario, Energy Board Report to the Lieutenant-Governor, 13 (O.C. 3100/74) at 53-54.

the Board has adopted an "all or nothing" approach and not relied on section 9 can be explained by three factors. Firstly, the Board is very conscious of the need for public accountability through its hearings. Therefore, it is reluctant to conduct in camera proceedings. Secondly, if information should not be publicly exposed, section 9 will not protect it in the context of the hearings of the Ontario Energy Board. Standing may be granted to many participants, some of whom may be business competitors of the party concerned about disclosure. Section 9 does not sanction expulsion of parties. Moreover, to exclude other participants or to otherwise present the information to the hearing panel in confidence would violate the rules of natural justice. This is the third factor. The Board's practice both protects the information and conforms with the rules of natural justice. However, it may preclude the Board's access to information that could improve the quality of decisions.

Rate hearings and hydro references require the submission of comprehensive financial and business information about costs, income and rate of return. This sensitive information is submitted in exhibits and may be inspected or published in Board decisions. The controversial area has been the confidentiality of contracts. When the Board has determined that competitive harm would ensue from public disclosure, it has refused to order production of contracts. In the 1977 Northern and Central Gas Company Rate Application, the Board believed that the negotiating position of Northern and Central Gas Company would not suffer as a consequence of public disclosure of its

range rate contracts.[273] Furthermore, it would force Northern and Central to provide better information about its pricing practices to its customers. Consequently it ordered disclosure. A similar issue was considered in the 1976 Hydro Rate Application[274] and the 1978 Hydro Rate Application.[275] During each hearing, an intervenor sought production of a Hydro contract to purchase fuel. The Board rejected the requests on the basis that the risk of possible commercial injury to Hydro attendant upon disclosure outweighed the importance of the information to the determination of the issues by the Board. In the

273 "[D]isclosure would reveal only existing rates together with existing terms and conditions. As such, the information would not materially assist competitors during negotiations for new customers, nor would it materially assist competitors during the re-negotiations of existing contracts as any new terms and conditions which the Applicant [Northern and Central Gas Company] may want to propose would not be known to them. The Board, therefore, believes that the negotiating position of the Applicant with respect to competition will not be changed in any significant way by the public disclosure of the contracts." E.B.R.O. 314-II, at 120.

274 During the hearing, the intervenor asked the Board to require Hydro to file its contracts relating to the purchase of coal supplies with the prices and names of the supplying companies deleted. Counsel for Hydro opposed this request, arguing that disclosure of the various terms of the contracts, particularly the non-standard terms, would be detrimental to the long-term advantage of Hydro because it would allow suppliers to bargain more effectively with Hydro. The Board stated that "the probative value of the contracts without the prices is not likely to be significant in relation to the possible commercial injury to Hydro". Its conclusion was based on "statements ... that these non-standard contract provisions ... will probably differ from one contract to another and the probability would be that their disclosure would mean that the terms most favourable to the supplying company would then become the standard terms for future negotiations". The arguments of opposing counsel can be found in the transcript, Volume 8, 4511-4528. The Board's ruling is on page 4578.

275 Ontario Hydro Bulk Power Rates for 1978, H.R. 6.

1978 Application, the Board expressly refused to examine the contract on a confidential basis.[276]

H. Discussion

This chapter has described information practices intended to protect different kinds of business information from public disclosure. Some decision-makers deny public access to their files to preserve the confidentiality of financial statements (Ontario Highway Transport Board and Ontario Energy Board), income and production information (Ontario Milk Marketing Board), other financial information (Ontario Energy Board) and industrial process information (Environmental Approvals Branch). Proceedings have been held in camera during the presentation of financial statements (Ontario Highway Transport Board) and other commercial information (Assessment Review Court). In the course of public hearings, the Ontario Energy Board has refused to order Ontario Hydro to produce contracts when the potential commercial danger to Hydro outweighed the probative value of the contracts to its decision.

Two discrete rationales appear to support these confidentiality policies. Several decision-makers asserted that public access would disclose the information to competitors, granting them an unjustifiable

276 Id., at 6-8.

advantage over the subject of the information to the ultimate detriment of the latter. Other information is kept secret out of concern for the privacy of the subject, without inquiry into the possible effects of public access. Much of the information that the Ontario Milk Marketing Board protects is confidential on this basis.

Whether and how information access should affect business information is the subject of a separate comprehensive study for the Commission.[277] Difficult questions about the appropriate balance between political accountability and legitimate claims to business confidentiality and what precise kinds of information should be secret are better left to be discussed there. However, the experience of other jurisdictions suggests that if government information reforms will be effected, they will undoubtedly acknowledge some limitation on public access to information in the interest of protecting business confidentiality.

The various freedom of information statutes, concerned solely with public access to documents, do not touch the issue of business confidentiality in the context of the public hearing.[278] This is a

277 S. Soloway, Business Information Held by the Ontario Government.

278 Very little has been written about this issue. See E. Gellhorn, "The Treatment of Confidential Information by the Federal Trade Commission: The Hearing" (1968) 116 U. Penn. L. Rev. 401; E. Gellhorn, "Business Secrets in Administrative Agency Adjudication" (1970), 22 Admin. L. Rev. 515; S.L. Cohn and H.I. Zuckman, "FCC v. Shreiber: In Camera and the Administrative Agency" (1968), 56 Geo. L.J. 451; R.G. Atkey, "The Problem of Confidentiality in Relation to the Administrative Process". A paper presented to the Conference on Administrative Justice, Ottawa, 1978.

complex procedural problem because the conflicting interests may be irreconcilable. When there is a request to examine documented business information by a non-participant, there are the opposing interests identified in the introduction to this chapter. Freedom of information statutes strive to delineate a proper balance between them, reflecting differing assumptions about the respective weight to be accorded the competing claims. The American Freedom of Information Act exempts matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." This exemption has been the source of extensive litigation.[279] The Australian Freedom of Information Bill 1978 provides an exemption to the general right of access if the disclosure of a document "concerning a person in respect of his business or professional affairs or concerning a business, commercial or financial undertaking ... would be reasonably likely to expose the person or undertaking unreasonably to disadvantage or ... would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future." This exemption enacts an alternative test that has been created by American courts in their interpretation of the commercial exemptions.[280] The Nova Scotia Freedom of Information Act and the New Brunswick Right to Information Act employ similar language to

279 See generally, Christine Marwick, ed., Litigation under the Amended Federal Freedom of Information (Washington: The Project on National Security and Civil Liberties, 1977) at 23-30.

280 Parliament of the Commonwealth of Australia, The Senate, Freedom of Information Bill 1978: Explanatory Memorandum, at 23-24.

protect business information. Each statute denies public access to information which "would result in financial gain or loss to a person or a dependent [of the government] or which would influence negotiations in progress leading to an agreement or contract."[281]

In the context of the public hearing, the business confidentiality issue cannot be resolved by a general statutory test that purports to draw the elusive line between justifiable disclosure and improper exposure. The question is complicated by the need to consider it in various hearing situations, each involving a different clash of conflicting interests. Two other background factors are always present as well. First, the common law rules of natural justice require that a party be given an opportunity to examine documents and information presented for the consideration of the board or tribunal. Second, by requiring that decisions be made at open hearings rather than as internal administrative matters, the legislature has asserted that these decisions are of a nature that demands public scrutiny. This may reflect either a belief that the administration of justice by tribunals, like courts, should be open; or a deliberate attempt to focus political responsibility for their decisions on the tribunal. These two concerns are not, of course, inconsistent.

281 The Right to Information Act, s. 6(c); The Freedom of Information Act, S.N.S. 1977, c. 10.

Regardless of the underlying rationale, what must be kept in mind in considering the confidentiality issue is that the legislature has already acknowledged that certain decisions should be made at public hearings. Moreover, for some kinds of decisions, it has not only permitted public scrutiny but allowed public participation by providing for notice and wide standing.[282] With few and limited exceptions, the legislature has not extended similar openness requirements to other decisions and operations of government. Consequently when making the general argument for greater access to government information, one must begin by asserting claims for government accountability as yet unrecognized by statute. In cases, such as those examined here, where the legislature has already required public hearings, particularly hearings contemplating public participation, this is unnecessary. The need for public accountability of the decision-making process in question has been recognized.

The problems of business confidentiality can best be discussed in the context of the following hearing situations:

> Situation 1. An administrative tribunal is the arbiter of a dispute between two parties, Party A, a private party, and Party B, either a ministry or a private party who is not a business competitor of Party A. The ministry has information about Party A. This example occurs when the Commercial Registration Appeal Tribunal hears a dispute between a registrant (or applicant) and the Registrar of Motor Vehicle Dealers and

282 The Environmental Assessment Act, 1975, s. 12; The Ontario Water Resources Act, s. 43(1), s. 44(1), s. 61(4); The Environmental Protection Act, 1971, s. 33a, s. 33c; The Ontario Energy Board Act, s. 37a(8).

Salesmen (or any other Registrar within the Business Practices Division of the Ministry of Consumer and Commercial Relations) or when the Ontario Highway Transport Board is the arbiter of a dispute between the Ministry of Transportation and Communications and a carrier.

Situation 2. An administrative tribunal is the arbiter of a dispute between two parties, Party C, a private party and Party D, a private party, who are business competitors. This may occur in the context of a hearing of the Ontario Highway Transport Board respecting an application for a Certificate of Public Necessity and Convenience.

Situation 3. An administrative tribunal is the arbiter of a dispute between two parties, Party E, a private party and Party F, a ministry that has business information about a third party, Party G. This could occcur in the context of a hearing by the Assessment Review Court. The Ministry of Revenue may have collected infromation about similar properties to that of the Party E who is contesting his assessment.

Situation 4. An administrative tribunal conducts a hearing during which there is wide participation by a number of parties, possibly competitors. Public participation through public interest representatives or by individuals is an integral facet of the hearing process. Hearings conducted by the Ontario Energy Board, the Environmental Assessment Board, and the Environmental Appeal Board may have this character.

Each of these situations raises the same basic issues questions: can the rules of natural justice be reconciled with legitimate claims to business confidentiality? Should the tribunal entertain confidential submissions respecting certain data? How can a hearing be conducted publicly if sensitive business information is in issue? If a tribunal does not compel[283] a party to submit information out of a concern

283 A tribunal to which Part I of The Statutory Powers Procedure Act, 1971 applies may issue a summons to "require any persons including a party ... to produce in evidence at the hearing documents and things specified by the tribunal" (s. 12). If a person ignores (cont'd)

for business confidentiality, is it thereby denying itself information essential to sound decision-making to the ultimate detriment of the public? To a great extent the answers to these questions will depend on the nature of the hearing and the identity of the parties.

Situation 1 is relatively simple. If Party A or the ministry wishes to adduce sensitive business information about Party A, the hearing can be held in camera pursuant to section 9 of The Statutory Powers Procedure Act, 1971 if the tribunal decides that the interests favouring confidentiality outweigh the principle that hearings be open to the public.

Situation 2 and Situation 3 are somewhat more problematic. Section 9 is not an adequate answer to the competing claims. The rules of natural justice require that Party C be given an opportunity to examine documents and evidence submitted by Party D. If D's case includes sensitive business information, disclosure to only Party C will be detrimental. Section 9 will allow expulsion of spectators from the hearing room, but not a party. It is silent on the question of how to

283 (cont'd) the summons, he may be found guilty of contempt (s. 13). Moreover there is no business information privilege which may be asserted to resist a summons. In a recent case, Canadian Javelin v. Sparling and LaFlamme (1978), 22 N.R. 465 (F.C.A.), the Federal Court of Appeal stated that documents containing business information "... do not have attached a privilege akin to that in respect of communications between a solicitor and his client", at 420. Also see discussion in 8 Wigmore, Evidence, s. 2212(3) (McNaughton rev. 1961).

reconcile Party C's need for information with Party D's concern that even limited disclosure to a competitor would be harmful.

The Ontario Highway Transport Board and the Assessment Review Court have developed identical procedures to cope with this dilemma. A party or its representative argues that the delicate nature of the evidence requires in camera presentation. If the tribunal concurs, spectators and the party who is the business competitor are excluded from the hearing room. The representative of the absent party undertakes not to disclose the information to his client. This procedure is informal and generally understood by persons appearing before the Assessment Review Court and the Ontario Highway Transport Board. Although this procedure is an apparently satisfactory accommodation of the opposing interests, it is not without problems. Firstly, its efficacy is contingent on the parties being represented by lawyers or agents. In a sense, it requires representation, and in so doing imposes both cost and formality on administrative hearing procedures intended to be inexpensive and expeditious. If the party entitled to examine the business information is not represented, what should the tribunal do? If it excludes the party from the hearing room and considers the evidence in confidence, there is a denial of natural justice. However, the evidence cannot be presented without danger to the party adducing it. Perhaps the solution is not to consider the evidence at all. The second problem concerns the role of the lawyer in this procedure. Is an undertaking not to disclose business information inconsistent with the lawyer's duty to his client?

In situation 4, strong conflicting forces interact to produce an irreconcilable tension. Added to the pressures within the other hearing situations -- the need for natural justice, the legitimate claim to confidential treatment of the business information, and the tribunal's concern to secure information essential to the best decision in the public interest -- is the imperative of a public hearing with public participation. Hearings before the Ontario Energy Board and the Environmental Assessment Board may include generous public participation.[284] However, very sensitive business information may be critical to the resolution of the issues before these tribunals. The environmental assessment process under Part I of The Environmental Assessment Act, 1975 contemplates the submission of comprehensive, and

284 From June, 1977 to February, 1978, the Environmental Assessment Board held two concurrent public hearings about applications by Nanticoke Waste Management Limited for Certificates of Approval for a waste disposal site. The following is a list of the participants: Nanticoke Waste Management Limited, Regional Municipality of Haldimand-Norfolk, City of Nanticoke, Constituency of Haldimand-Norfolk, Ministry of the Environment, Haldimand Federation of Agriculture, Nanticoke Ratepayers Association, Citizens Committee for the Preservation of the Environment, Jarvis Board of Trade, Port Dover Board of Trade, Norfolk Federation of Agriculture, Pollution Probe, Hagersville-Norfolk Christian Farmers Association, Alternative Magazine, Steel Co. of Canada Limited, Eastern Lake Erie Trawlers Association, Hickory Beach Cottages Association, Haldimand-Norfolk Waste Disposal Committee, Haldimand-Norfolk Pollution Control Committee, and 22 named individuals (See Appendix B to Environmental Assessment Board, Report, April 20, 1978).

In the 1978 Hydro Reference (H.R. 6), the following were intervenors: Ontario Municipal Electric Association, Association of Major Power Consumers in Ontario, Electrical and Electronic Manufacturers Association of Canada, Consumers Association of Canada, Lake Ontario Steel Company Limited, Dow Chemical of Canada Limited, Municipal Distribution Systems, and Union Gas Limited.

possibly delicate, information about a proposed undertaking. Since no Part I public hearings have been held, the Board has not yet been faced with this issue as a practical matter. The Ministry of the Environment has been studying alternative procedural solutions, but has not published its working papers.[285] Board hearings under The Ontario Water Resources Act and The Environmental Protection Act, 1971 have been held in public to date.

Wide participation renders inappropriate procedures developed by other tribunals in the context of different hearing situations. Evidence cannot be presented to the hearing panel in confidence because the participants will be denied information crucial to effective participation. To exclude the many participants from the hearing room and give the information to the lawyers only may satisfy the rules of natural justice. However, it contradicts the essential spirit of statutes that require certain environmental approvals to follow public hearings and provide notice to the public so they can attend them. In effect, it creates two classes of public participants, a represented group and an unrepresented class. Only the former are able to fully

285 For a recent analysis based on two discussion papers prepared for the Ministry of the Environment by Frank K. Palmay, see D.P. Emond, Environmental Assessment Law in Canada (Toronto: Emond-Montgomery, 1978), at 90-102. The Study Papers, "Land Acquisition and the Environmental Assessment Act" and "Trade Secrets and the Environmental Assessment Act: A Discussion Paper" provide a detailed discussion of confidentiality problems and suggest, in chart form, an analytical method for dealing with them. The charts are reproduced in Professor Emond's book.

present their submission in a manner consistent with natural justice through their lawyers.

Section 19 of The Environmental Assessment Act, 1975, a provision analogous to section 9 of The Statutory Powers Procedure Act, 1971, is too crude an instrument to untangle the subtleties of this issue. It simply states that a hearing may be held in camera. Does this provision contemplate that the Board may ask members of the public, including active participants, to leave the hearing room? Will it allow lawyers to remain during the presentation of sensitive business information? Either alternative would incur immediate and bitter public response.

The Ontario Energy Board has addressed this problem in the context of several hearings. Its solution has been described above as "the all or nothing approach." Either information is given in evidence and exposed to the scrutiny of all present or it is not considered at all by the Board. To decide whether information should be submitted, the Board weighs the danger of disclosure against the probative value of the information. The Board procedure satisfies the rules of natural justice and the concern for public accountability. It may disappoint a party who may be forced to provide information believed by that party to be sensitive. It raises a single question. If the hearing members decide that because disclosure of certain information would cause commercial harm, the Board should not consider it, does the Board exclude evidence that may in fact be critical to a good determination? Is the public interest in "the best decision" and sound economic regulation thereby compromised?

Posing many questions throughout a concluding discussion certainly does not create the requisite catharsis usually associated with a summary. A failure to present the answers may be a problem that is even more annoying. However, this is a novel issue to which answers, particularly general answers, are not readily available. The tribunals themselves are only beginning to grapple with it in an as yet informal, ad hoc manner. At the federal level, the issue has been studied with greater care and formality. The Anti-Dumping Tribunal[286] and the Canadian Radio-Television and Telecommunications Commission[287] have each developed a code of rules to guide the conduct of hearings, including rules directed to the confidentiality problem.

The complexity of the issue and differences among Ontario tribunals suggest that a general solution is not attainable. Each Ontario tribunal should examine it in a deliberate and thorough manner in consultation with lawyers, public interest groups and others concerned about its solution. Appropriate procedures should be developed, codified, and published in The Ontario Gazette or elsewhere.

286 Anti-Dumping Tribunal Rules of Procedure, s. 12 (SOR/74-581).

287 Canadian Radio-Television and Telecommunications Commission, Draft CRTC Telecommunications Rules of Procedure (Ottawa: Ministry of Supply and Services, 1978), s. 21; CRTC Procedures and Practices in Telecommunications Regulation, Telecom. Decision CRTC 78-4, May 23, 1978 at 26-29.

CHAPTER VI

STAFF REPORTS, RESEARCH, ADVICE, STATISTICS

The disclosure of staff reports is a question that has only recently attracted academic interest.[288] The issue arises when tribunal staff do research or investigations to provide a board or tribunal with information necessary to the performance of its statutory function. Both members of the public and particular persons affected by administrative decisions would have an interest in its disclosure. The general public and its public interest representatives would want to examine matters affecting consumers, such as health and safety inspection reports or investigations of fraudulent business practices. Furthermore, the disclosure of the information would be essential to public evaluation of the performance of the tribunal. Without information about the basis of a decision or action, an intelligent assessment is impossible.

A participant in a decision would want to examine any reports before the decision-maker so that he could prepare his arguments as effectively as possible.

288 H.N. Janisch, "Fairness: Confidentiality and Staff Studies", Current Issues in Administrative Law (Halifax, 1975, Dalhousie Continuing Legal Education Series, No. 7) at 14.

In Ontario, amongst the boards and tribunals examined in this study, the disclosure of staff reports is a minor issue. Most of the boards and tribunals surveyed perform their function in a hearing at which they depend entirely on the parties to provide the necessary information. They do not conduct investigations or research. Usually, they consist only of the board members and administrative staff.[289] There are, however, exceptions to the general practice. The Ontario Milk Marketing Board undertakes consumer and market research, assisted by professional staff and outside consultants. Among the specialists retained are economists, consumer and marketing analysts, agrologists and transportation specialists. The research conducted by the Ontario Milk Marketing Board is of a general nature, unrelated to specific decisions respecting individual producers or processors. Consequently the disclosure of reports to an affected party is not an issue in this context.

Most of the research reports are available to members of the public on request. However certain analytical reports by the economic consultants are kept confidential. The various divisions of the Ontario Milk Marketing Board -- finance, marketing, promotion -- often request their assistance in evaluating data. Neither the data nor the reports are

289 The following tribunals have no supplementary staff other than persons employed in purely administrative tasks -- the Environmental Appeal Board, Environmental Assessment Board, Social Assistance Review Board, Commercial Registration Appeal Tribunal, Ontario Highway Transport Board, Land Compensation Board, Assessment Review Court, Building Code Commission.

public, as the material is used to formulate new policies and price changes.

The Ontario Energy Board also relies on staff and other reports. The audit section of the Ontario Energy Board may be requested to undertake a financial analysis of data available in the industry and of information that has been submitted by the utilities to the Energy Returns Officer. When there is a need for special expertise and further analysis, the Board counsel and the case manager may retain outside consultants to prepare additional reports. The reports are intended for the use of Board counsel in his presentation of evidence and argument at the hearing. If they are to be examined by the Board members responsible for the decision, the reports will be adduced by counsel at the hearing. In accordance with the general Ontario Energy Board policy, if reports are to be submitted to the Board panel, all parties, including intervenors, will have access to them at the hearing. The reports will then become a part of the public record. The Board counsel however may decide not to present a report at the hearing, but nonetheless use it as the basis of his cross-examination and argument. Of the consultant reports not filed as exhibits at the hearing, about 80% are filed with the Board and are available to the public. The remaining 20% are not filed in order to preserve the confidentiality of sensitive commercial information, the disclosure of which may damage the company. These reports then are entirely secret as they are not exposed at the hearing nor available in the hearing file.

The other tribunal which engages in investigative activities is the Criminal Injuries Compensation Board. Investigative reports are not available to the general public but their comments may be disclosed by the Board to an applicant at the hearing.

Administrative decision-makers within a ministry may have investigative responsibilities. The policies and practices respecting the reports of social workers in the Ministry of Community and Social Services were discussed in Chapter IV. The Registrar of Motor Vehicle Dealers has investigative powers that allow him to ensure that persons registered under The Motor Vehicle Dealers Act comply with the legislation and conduct business in a responsible and honest manner. These powers have been described elsewhere.[290]

The Registrar has an investigative staff consisting of a Chief Compliance Officer and four Compliance Officers under his direction. There are also "Consumer Services Officers" under the direction and control of the Consumer Advisory Services Branch. They are responsible for the enforcement and administration of the statutes within the jurisdiction of the Business Practices Division of the Ministry outside of Metropolitan Toronto. When a matter becomes too complex or for other reasons the Compliance Officers require assistance, the Registrar may seek the aid of the Investigation and Enforcement Branch of the Ministry. If the Registrar does employ members of this Branch or

290 See text accompanying notes 191-194, supra.

Consumer Services Officers, they are under his written authority and direction.

Inspections performed by the Consumer Services Officers and the Compliance Officers are recorded on standard forms. Those conducted by the members of the Investigation and Enforcement Branch result in narrative reports. The practice regarding these reports is consistent with the general policy of the Business Practices Division of the Ministry. They are confidential by statute and maintained in secrecy. If the report is to be presented as an exhibit before the Commercial Registration Appeal Tribunal, it must be provided to a person prior to the hearing.[291] There is no right of access to a report otherwise.

The Registrar compiles statistics about his activities under the legislation. A monthly complaint sheet summarizes information respecting complaints about motor vehicle dealers, including statistics indicating whether the car was new or used, the nature of the complaint, the manufacturer, and the number of investigations and inspections. The Registrar also submits a monthly report to the Director of the Business Practices Division. Neither document is available to the public.

The former Registrar supervised research into problems concerning premature rusting and the rust-proofing of automobiles. The results of this research have been made available in a brochure published by

291 The Ministry of Consumer and Commercial Relations Act, s. 9a(3)(b).

the Ministry.[292] The raw data and information collected and analyzed in the course of the research have been treated in a confidential manner. The reasons for this policy were presented forcefully by the former Registrar. In its raw form, the research associated a number of named dealers with statements of opinion, many of which were unsubstantiated. To a great extent, the success of the research was contingent on the cooperation of both the motor vehicle industry and the rust prevention business. Information was secured voluntarily from the dealers and others on the condition that it was not to be divulged. The former Registrar was of the opinion that had this assurance of confidentiality not been given, information of a quality equal to that provided would not have been otherwise available. Thus, the level of research would have suffered to the ultimate detriment of the public.

The only other decision-maker that referred to statistical reports was the Environmental Appeal Board. An annual statistical summary of the Board's activities during the preceding fiscal year is sent to the Ministry of the Environment, the Chairman and members of the Board. Although not generally available, it may be obtained by a request to the Board Secretary. Its contents can be otherwise discovered by a careful examination of the hearing record files of the Board for the year in question.

292 Ont., Ministry of Consumer and Commercial Relations, Rust Inhibition - Is It for You? (Toronto: Ministry of Consumer and Commercial Relations, 1976).

The other decision-makers surveyed did not refer to the maintenance and reporting of statistics. However, such information may be available in the annual report of the board or tribunal, or the report of the ministry when the decision-maker reports through it.

The confidential treatment of some of the matters to which we have referred cannot be justified. Certain statistics and reports can be released without detriment to the efficient operation of government or to the disadvantage of private citizens. At the very least, statistical summaries of the activities of all administrative decision-makers should be available.

If the disclosure of a report would cause harm to an individual or be destructive of a public interest, such as that in effective administration, it should not be subject to public scrutiny. If a freedom of information statute is enacted, disclosure can be prevented by an exemption describing the kind of information contained in the report, or the apprehended injury that would ensue from its release. Reports containing identifiable personal information or sensitive commercial information could thus be protected. If a report includes the advice or opinion of a civil servant, an exemption can be drafted to secure that document or a portion of it from release.

How staff reports, research, and statistics should be treated must depend on the kind of information included in individual documents or the harm that would be caused by disclosure. As a general matter,

one cannot categorically decide that all staff reports or all research should be either public or confidential.

CHAPTER VII

DECISIONS

If an administrative decision-maker gives written reasons explaining its decisions, the question of public access to those decisions assumes importance. Their availability is a significant issue because it is in its reasons for decision that one can discern an expression of policy by a board or tribunal. A person may be interested in that policy as a citizen concerned about government conduct, or as a party preparing for a future adjudication or hearing by the decision-maker. Thus the issue is both a matter of accountability and a question of access to the relevant law made by the decision-maker.[293] In its two facets, it is a question closely related to the secret law issue.

Whether an administrative decision-maker provides reasons for its decisions depends on statute because the common law rules of natural justice do not require that reasons be given.[294] Boards and tribunals

293 Professor H.N. Janisch discusses the importance of the publication of decisions in the Introduction to A.H. Janisch, Publication of Administrative Board Decisions in Canada (London, Ontario: Canadian Association of Law Libraries, 1972) at ii-viii.

294 Wade, supra note 36, at 463.

governed by Part I of The Statutory Powers Procedure Act, 1971 must give reasons in writing only if requested by a party.[295]

Other administrative decision-makers may be required by statute to provide them. For example, the Registrar of Motor Vehicle Dealers and Salesmen must give reasons to a registrant when he proposes to suspend a registration.[296] The Director of the Provincial Benefits Branch must give reasons for cancellation of benefits under The Family Benefits Act.[297]

The concern to have access to decision is not directed to decisions per se, but to decisions that include reasons. Although it would be interesting to know, for example, that an application was refused or that a tribunal decided in favour of one party and not the other, it is the reasons for the decision that are of crucial significance.

The practices of the boards and tribunals surveyed vary considerably, reflecting a discordant approach evident among the many boards and

295 The Statutory Powers Procedure Act, 1971, s. 17. The Ontario Energy Board must prepare written reasons where an application has been opposed. If an application has not been opposed, the Board must prepare written reasons if requested by the applicant. The Ontario Energy Board Act, s. 17.

296 The Motor Vehicle Dealers Act, s. 7(1).

297 The Family Benefits Act, s. 10c.

tribunals in the province.[298] Although the following discussion refers to the availability of "decisions," the word "decisions" should be read to mean decisions for which reasons have been given.

Several boards -- the Commercial Registration Appeal Tribunal, Ontario Highway Transport Board, Environmental Assessment Board, Milk Commission of Ontario, Environmental Appeal Board, Building Code Commission, Land Compensation Board, and Ontario Energy Board -- permit examination and photocopying of decisions in accordance with the procedures governing access to files generally. Various practices supplement this form of access. Significant decisions of the Land Compensation Board are published in the Land Compensation Reports. The annual report of the Criminal Injuries Compensation Board contains a summary of its decisions and is distributed to interested lawyers. Decisions of the Social Assistance Review Board are distributed to libraries and others with names of parties and witnesses deleted to maintain their anonymity. The Ministry of Consumer and Commercial Relations publishes decisions of the Commercial Registration Appeal Tribunal in summarized form pursuant to statute.[299] They are also organized and indexed in the

298 A 1972 study undertaken for the Canadian Association of Law Libraries surveyed the practices and policies of administrative agencies across Canada respecting the availability and publication of their decisions. Approximately 45 Ontario decision-makers were examined. The report of the study showed that practices varied considerably. Although it is somewhat dated, primarily because subsequent government action created new tribunals and destroyed others, the report is nonetheless instructive as a guide to the diversity of approach. A.H. Janisch, supra note 293, at 31-44.

299 The Ministry of Consumer and Commercial Relations Act, s. 7(10).

Ministry of Consumer and Commercial Relations Library, where they may be photocopied at a modest cost. Certain decisions of the Ontario Energy Board are published and available for purchase at the Ontario Government Bookstore. The Milk Commission sends its decisions to the Press Gallery.

Some boards circulate decisions to interested persons who subscribe to a mailing list, or furnish decisions to industry organizations that inform their members of the relevant policy through other means. The Ministry of Consumer and Commercial Relations distributes a Building Code Newsletter containing decisions of the Building Code Commission to approximately 14,000 people on a mailing list. Decisions of the Environmental Appeal Board are sent to libraries across the country and to interested persons. The publication of the important decisions of the Land Compensation Board is supplemented by mailing them to lawyers and universities. The Ontario Highway Transport Board sends decisions made pursuant to the Public Commercial Vehicles Act to the Ontario Trucking Association, which publishes them in its weekly bulletin. When a decision of the Assessment Review Court is important, it may be published in the bulletins of the Institute of Municipal Assessors. Its decisions are otherwise subject to the discretionary policy governing access to files.

The usual reasons offered for the failure to publish decisions are that the great volume of decisions renders it too expensive to publish them or that there has been insufficient interest to warrant publication.

Although these arguments are supported by a laudable concern about cost, they do not adequately justify current practice. When a tribunal does make many decisions in a year, significant decisions can be selected for publication. Significance could be determined on the basis that either they will have an impact on future decisions ranging from being persuasive to acting as precedent, or that they are concerned with important issues of public interest. If decisions are not published, they should nevertheless be distributed to libraries across the province and to interested persons at cost. At the very least, decisions should be made readily available for perusal at the offices of the board and at ministry offices across the province.[300]

A concomitant requirement of an obligation to publish or distribute, as the case may be, should be the creation of an organized method of indexing decisions either by subject matter or issue, so that they can be used by interested persons. Without a form of index, it is difficult, if not impossible, for a person without experience with a particular tribunal to distill its policy trends from an accumulation of decisions. Yet some boards do make their decisions available in this ineffective fashion. If, for example, a person wanted to research an issue within the jurisdiction of the Social Assistance Review Board, unless he was informed of a specific decision concerning it, he must examine the decisions at random to discover a relevant case.

300 The McRuer Report recommended that decisions of all tribunals be made available to the public. Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 223.

Recently the Ontario Highway Transport Board compiled its decisions into binders and devised a detailed index according to issue and subject. This is a practice deserving widespread imitation.[301]

In summary, this paper presents two recommendations:

1) Decisions of administrative boards and tribunals should be published. If there is insufficient public interest to justify the expense of publication, they should be distributed to local and district offices of the relevant ministry and be available for photcopying at minimal cost.

2) Decisions should be organized and indexed in a comprehensible manner.

301 The creation of the binder and the index during the summer of 1978 was part of the comprehensive internal review undertaken by the Board. Formerly Board decisions were located in separate files that had to be individually requested to read them. There was no form of index. This made research into Board policy or "case law" very difficult. One had to follow a tedious, circuitous route that could have been easily expedited. It was.

CHAPTER VIII

SECRET LAW

Perhaps the most disturbing phenomenon from a freedom of information perspective to be observed in the Ontario administrative process is the existence of "secret law." Only recently has secret law emerged as a discrete concept of some force in administrative law. Academic interest in the subject was first evinced more than thirty years ago when R.E. Megarry expressed concern about a growing body of informal administrative law, which he called "administrative quasi-legislation," noting that its "haphazard promulgation" rendered accessibility to administrative rules by interested persons difficult, if not impossible.[302] The term "secret law" had its origin in testimony given by Professor Kenneth Culp Davis before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee in 1964[303] to refer to the same phenomenon in the United States. Eventually the concept evolved from being exclusively an object of academic interest[304] to

302 R.E. Megarry, "Administrative Quasi-Legislation" (1944), 60 L.Q. Rev. 125.

303 88th Congress 2d Sess., s. 1663, at 273.

304 K.C. Davis, "The Information Act: A Preliminary Analysis" (1967), 34 U. Chi L. Rev. 761 at 779; K.C. Davis, Discretionary Justice: A Preliminary Inquiry (Baton Rouge: Louisiana State University Press, 1969) at 110.

one having widespread judicial recognition in the United States.[305] In Canada, however, the term has made intrusions into academic commentary[306] only very recently and has not yet received judicial adknowledgement.

Secret law refers to guidelines, manuals, directives, policy statements and other written documents that are utilized by persons or administrative tribunals exercising statutory powers of decision, but are not required to be published or made available by legislation and are not otherwise disclosed. The guidelines or manuals may be substantive in the sense that they articulate conditions of entitlement to benefits or privileges in greater detail than set out in the relevant statute or regulations; or they may deal with matters of procedure alone. Whether substantive or procedural, the significance

305 Sterling Drug Inc. v. FTC, 450 F. 2d 698, 708 (D.C. Cir., 1971); Hawkes v. IRS, 467 F. 2d 787 (6th Cir., 1972); Schwartz v. IRS, 511 F. 2d 1303, 1305 (D.C. Cir., 1975); Ash Grove Cement Co. v. FTC, 511 F. 2d 815, 818 (D.C. Cir., 1975); NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975).

306 H.N. Janisch, "Secret Law Condemned" (1976), 2 N.S.L.N. 19; H.N. Janisch, "What is 'Law'? -- Directives of the Commissioner of Penitentiaries and Section 28 of the Federal Court Act -- The Tip of the Iceberg of 'Administrative Quasi-Legislation'" (1977), 55 Can. B. Rev. 576; B. Crane, "The Citizen and the State: Current Problems of Public Law", [1978] Spec. Lec. LSUC 213; T.G. Ison, "The Intrusion of Private Law in Public Administration" (1976), 17 Cahiers du Droit 799; B. Gibson, "Freedom of Information and Canadian Welfare Law" (1973), 2 B.C.W.L. 6; Atkey, supra note 278; for a recent discussion of secret law in the context of the Workmen's Compensation Board, see Ison, supra note 5, at 48-66; Ont., The Ombudsman, Fourth Report at 46-49; S. Oziewicz, "Public WCB claims manual urged in Maloney's report", Globe and Mail, July 25, 1978. The Commission received a submission on this issue; see David Lepofsky, Freedom of Information and Secret Law in Canada.

of secret law is that decisions concerning the rights and liabilities of individuals are affected by standards or policies of which they are unaware. Yet those standards or policies may be very influential, and possibly determinative of the decisions.

This practice can be criticized simply as a matter of fairness. It is unfair to require the participation of an individual in an administrative decision that directly concerns him without disclosing the criteria used in making the decision. Without knowledge of the standards used by the decision-maker, the individual is unable to prepare his arguments in the most persuasive manner possible. As well, he is deprived of an opportunity to comprehend fully the process and standards to which he is subject, a failure which diminishes respect both for the justice of the particular proceedings and the integrity of the administrative decision-maker.

A second general objection to the existence of secret law is based on accountability or responsibility. Secret law is usually employed by decision-makers to administer statutes and possibly attendant regulations, both subject to public scrutiny and at least formal approval by the legislature and Cabinet respectively. Manuals, guidelines and the like are not exposed to a similar examination, despite their impact on individual decisions and the fact that they are in essence an important source of government policy. Nominal responsibility for their content rests on the minister whose subordinates rely on them. However, without disclosure of even the existence of manuals, that

responsibility cannot be fixed on the minister. Public ignorance means that in fact no one answers for secret law. This is not to suggest that the manuals or guidelines should be formally approved by the legislature, although the suggestion would be consistent with accountability and responsible government, but rather that they should at a minimum, be made available or published to allow accountability through public scrutiny. Either alternative would ensure a greater degree of responsibility to the public than now exists.

In this paper, no attempt will be made to engage in a jurisprudential or philosophical discussion about whether the elements of secret law -- directives, manuals, guidelines, policy statements -- constitute "law" in any conceptual sense. That such a discussion would raise the most profound issues is not doubted. The approach followed here will be functional. It will consider such materials to be sources of "law" if guidance is sought from them by a decision-maker in the course of determining an individual's rights, privileges, obligations or liabilities or if they affect procedures with respect to those decisions, although they may not be formally binding on the conduct of the decision-maker or the individual concerned.

A policy of publishing or making available secret law is consistent with and follows from basic principles. That disclosure has not yet been compelled by the courts or the legislature is a consequence of a highly technical analysis of its nature relying on difficult, perhaps artificial, distinctions and neglecting its functional significance in the making of individual decisions.

A. Background Principles and Considerations

In this section of the paper, a brief account will be given of two well-accepted principles of our legal and constitutional system, which, in this writer's view, offer support for the recommendation that "secret law" be made available.

First, there will be a discussion of the concept of "the rule of law" which suggests that individuals be able to discover the policies governing their conduct. Second, brief consideration is given to the implications for the secret law problem of the convention of ministerial responsibility, a principle demanding political responsibility for the content of governmental policies. It is suggested that without public access to secret law, neither of these principles can be fully realized.

A concern for the principles of the rule of law and ministerial responsibility underlies the current treatment accorded subordinate legislation or regulations. In Ontario, legislation requires regulations to be published in order to be effective. These provisions will be described in the third section of this part. Since manuals, guidelines and directives are not embraced within the definition of "regulation," they are immune from this requirement. As will be seen, the distinction drawn between subordinate legislation and secret law is very fine indeed. They so resemble each other in purpose and use that the rationales supporting publication of the former apply equally to the availability of the latter.

Finally, brief mention is made of the underlying phenomenon which has given rise to the growth of secret law -- the possession of discretionary power by public servants. The development of manuals, directives and guidelines is but an administrative response to channel the choices created by discretion.

1. The Rule of Law

The "Rule of Law" doctrine was forcefully articulated in the late nineteenth century in Dicey's The Law of the Constitution.[307] It has since endured as a basic constitutional tenet of the Anglo-Canadian system, although its precise meaning and implications have been subject to continuous debate and uncertainty since its introduction.[308] The controversy has focused firstly on the correct interpretation of Dicey's principle, and secondly on the accuracy and wisdom of his statement of the Rule of Law.

Dicey conceived of the Rule of Law as a source of protection for fundamental rights and freedoms. Three central themes or attributes were ascribed to the doctrine. The first is relevant to the subject of this paper.

307 A.V. Dicey, Introduction to the Study of the Law of the Constitution, ed. E.C.S. Wade (10th ed., London: MacMillan, 1959).

308 Davis, supra note 304, at 28-33; Wade, Introduction, supra note 307.

> We mean in the first place that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. 309

The McRuer Report interpreted Dicey in the following manner:

> In effect Dicey envisaged the English legal system as a system of law of the hypothetical kind ... in which all rules of law are completely stated so that the courts in the application of the law are not required to exercise any policy judgment. In such a system an individual has defined rights protected in the ordinary courts which can only be taken from him by the exercise of the sovereign legislative authority of Parliament. He is protected from detrimental action by Parliament through the political and practical limitations on its authority under our democratic system. 310

Dicey's statement of the Rule of Law has been severely criticized partially because it apparently equated the possession of any discretion by a decision-maker with arbitrary rule and injustice. This view disregards the reality that many discretionary powers must, of necessity, be conferred on governmental authorities and that such grants do not inevitably result in unjust government action. Further, Dicey's theory apparently assumes that specific rules of law may be articulated in such numbers and in such minute detail as to exclude completely exercise of discretion by the decision-maker in all future decisions. Such exhaustive definition of rules is, of course, impossible. Some

309 Dicey, supra note 307, at 188.

310 Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 56-57.

discretion will inevitably remain.[311] To the extent that Dicey's theory denied this practical limitation on the ability to legislate, his expression of the Rule of Law is seriously defective. Moreover his statement did not accurately reflect the state of administration even in his own time. In the England of 1885, various statutes conferred discretionary powers on a number of extra-parliamentary and extra-judicial bodies and those powers could not be questioned in the courts.[312]

Despite these inherent weaknesses, Dicey's version of the Rule of Law doctrine has had an enduring influence on constitutional theory. Modern commentators have generally interpreted it as a requirement that decisions affecting the rights and liabilities of individuals should be made as much as possible by the application of known principles, so that individuals can ascertain with reasonable certainty the consequences of their acts and the powers of the state.[313] This view recognizes the essential justice in Dicey's theory. Underlying it is a realization that the inadequacy of Dicey's formulation is attributable in part to the fact that Dicey was writing in an economic and social context which imposed duties and functions on government very different from those of the

311 Davis, supra note 34, at 42-43; G. Williams, Salmond on Jurisprudence (11th ed., London: Sweet & Maxwell, 1957) at 44.

312 Dicey, supra note 307, at cxvi-cxvii.

313 Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 58; Dicey, supra note 307, at cx-cxi; Report of the Committee on Administrative Tribunals and Public Inquiries (Franks Report) (Cmnd. 218, 1957), para. 29; E.C.S. Wade and G.G. Phillips, Constitutional Law rev. by E.C.S. Wade and A.W. Bradley (London: Longmans, 1970) at 66-69.

modern government. In his day, a pervasive laissez-faire philosophy emphasizing individual liberty favoured minimal government activity and as little legislation as possible. Since the proper concerns of the state were primarily those of public order and security, few rules were needed. The role of the modern state, however, has greatly expanded at an increasing rate. The typical modern government engages in complex economic regulation and the detailed provision of services to individuals. Its ubiquitous intervention demands countless legislative rules and widespread grants of discretion to administrative officials.[314] Although these modern realities have certainly qualified Dicey's version of the Rule of Law, they have not devalued its fundamental meaning, that, to the extent possible, the law which governs human affairs must be accessible in advance to those whose conduct it purports to regulate. The concept thus remains an important protection for individual rights.

2. Ministerial Responsibility

Parliamentary democracy is a system of government that requires the executive to be responsible to the legislature, and that both legislature and executive be responsible to the people.

314 Dicey, supra note 307, at cii-ciii; Wade and Phillips, supra note 313, at 66-69.

The Legislative Assembly of Ontario may exercise its legislative powers within the constitutional limitations imposed by the British North America Act[315] subject to the scrutiny and, at election time, the approval of the electors of Ontario. The executive is made responsible to the legislature and hence, indirectly to the electorate through the convention of ministerial responsibility. According to this convention, each minister is responsible for all operations and acts of the section of the executive branch assigned to his supervision and control, which is the ministry. He will be held accountable for policy decisions, determinations respecting individuals, and any substantive or procedural rules made by public servants under his formal direction.

The operation of the convention has been described by a theory of delegation:

> ... the delegation of power has been understood to be vertical in nature: the legislature was thought to delegate power to the executive council or to departmental officials who were responsible to the legislature through their ministers. In such a case the principle of ministerial responsibility would be operative, ensuring that the decisions made and the deeds done by these officials would ultimately coincide with the wishes of the cabinet; hence they would meet with the approval of a majority in the Legislative Assembly. 316

In theory, ministerial responsibility ensures ultimate responsibility and accountability to the electorate. The adequacy of this theory has,

315 30-31 Vict., c. 3.

316 Schindeler, supra note 3, at 74.

however, been the subject of recent debate.[317] A controversial issue has been whether ministerial responsibility can be reconciled with the creation of administrative bodies having significant administrative and legislative powers outside the normal ministerial hierarchy.[318] This problem of accountability troubled the Ontario Committee on Government Productivity. In part, the restructuring of the Ontario government which followed the report of that Committee was an attempt to respond to this problem. To institute at least a formal political accountability, portfolios were redefined to bring administrative agencies within the structure of departments to form "ministries." The ministries would thus be rendered accountable to the legislature for the activities of the agencies. Despite this formal change, the nature of the relationship between minister and agency has remained a subject of considerable uncertainty and discussion.[319]

317 The debate is briefly discussed in a background paper prepared for this commission by Professor Kenneth Kernaghan. See K. Kernaghan, Freedom of Information and Ministerial Responsibility (Research Publication 2, Commission on Freedom of Information and Individual Privacy, 1978).

318 Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 45.

319 Supra note 3.

3. Subordinate Legislation

The terms "subordinate legislation" and "delegated legislation" are used interchangeably to refer to rules made by a person or body other than the legislature pursuant to a rule-making power conferred by an act of the legislature. Generally these rules are in the form of regulations having the same force and effect as statutes passed by the legislature.[320] That such a body of rules exists is, in a strict sense, at variance with both the Rule of Law and ministerial responsibility. The position that should emerge from a combination of the two principles can be described in the following manner:

> ... all rights and liabilities of the individual in relation to others and to government would be established by stated rules of law applied by the ordinary courts of law. New rules would be made by the legislature, which is representative of and responsible to the people, with constitutional and political safeguards for the exercise of its power. There would be no arbitrary or discretionary powers vested in bodies or persons other than the legislature, or those directly responsible to it. 321

This statement does not contemplate the existence of power to make rules in any body other than the legislature. However, the exigencies of modern government do not permit such a system. The modern state is involved in myriad activities, many of which demand a detailed technical expertise lacking in the legislature or are of a novel character that

320 Institute of Patent Agents v. Lockwood, [1894] A.C. 347 (H.L.); R. v. Beaver Creek Correctional Camp, ex parte MacCaud, [1969] 1 O.R. 373 (C.A.).

321 Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 336.

necessitates experimentation and flexibility.[322] Complete and exhaustive definition of rules is not possible, nor always desirable, particularly where individualized justice is sought. Moreover, the legislature does not have sufficient time to enact rules in greater detail. Often pressing need or emergency will dictate expeditious passage of skeletal legislation so that effective action can be taken.

These factors have been recognized as contributing to the existence of a continuing trend towards the enactment by legislatures of general statutes that are supplemented by more detailed regulations.[323] In adopting this method, legislatures have decided to provide for completion of the details of statutory schemes by stated rules rather than allow the nature of the statute to evolve out of individual decisions made in the exercise of administrative discretion by ministers or public officials. To the extent that explicit rules are developed, the area of discretion will be reduced, although it cannot be eradicated entirely.

Several reasons support a preference for regulations over discretion. A statement of rules setting out the consequences of action will allow persons to plan their affairs and more confidently structure their relations with other individuals and the government. Rules are

322 Wade and Phillips, supra note 313, at 602-603; Canada, Third Report of the Special Committee on Statutory Instruments (Ottawa: Queen's Printer, 1969) at 4-5.

323 Id.

conducive to a consistent approach to the making of individual decisions so that like cases will be treated in a similar manner. They guide a person or body entrusted with the statutory power of decision so that each decision or application need not be separately considered in the same depth and detail.[324] Apart from these practical advantages, the choice of regulations is certainly more consistent with the principle of the Rule of Law which, despite its elusive character, is recognized as a fundamental aspiration of our constitution.

The necessity of some form of subordinate legislation in the modern state has been generally accepted and is not really an issue. Ancillary questions, however, remain. Concern has been expressed as to whether proper safeguards exist to ensure that regulations are enacted by a person or body responsible and accountable to the legislature.[325] This is essential because decisions about rules affecting individuals should be subject to political control. The McRuer Report regarded the absence of political accountability as an "unjustified encroachment on civil rights."[326]

324 D.J. Galligan, The Nature and Functions of Policies Within Discretionary Power, [1976] P.L. 332, at 332-334; Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 335-336; Davis, supra note 304.

325 Schindeler, supra note 3, at 212-15; Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 370.

326 Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 357-360.

In Ontario, political responsibility for subordinate legislation is at least formally attained by the general practice of conferring power to enact subordinate legislation on the Lieutenant Governor-in-Council or on a single minister, or by making the exercise of subordinate legislative power subject to the supervision or approval of Cabinet or a minister. In essence, this is a delegation of legislative power from the legislature to the executive branch, the latter in theory being made responsible to the legislature by the convention of ministerial responsibility. The MacGuigan Report, a federal study considering these questions, stated that "the first safeguard respecting the device of delegating power to legislate is that the power should be given to a responsible authority."[327] It recommended that the Governor-in-Council be given authority to make regulations having substantial policy implications, and that other regulations either be made subject to approval prior to becoming effective, or subject to subsequent disallowance by the Cabinet or a minister.[328]

In Ontario, the formal responsibility for subordinate legislation is supplemented by a legislative review mechanism. Following a recommendation in the McRuer Report, The Regulations Act[329] established the Standing Committee on Regulations, a legislative

327 Third Report of the Special Committee on Statutory Instruments, supra note 322, at 36.

328 Id., at 34-35.

329 R.S.O. 1970, c. 410.

committee responsible for the supervision of subordinate legislation to ensure that it is proper and within the scope of the delegated legislative power. Its supervisory power, however, is limited as the Committee cannot inquire into the "merits of the policy or the objectives to be effected by the regulations or enabling statutes."[330]

Another major safeguard is established by The Regulations Act. It establishes a mandatory procedure for the promulgation of regulations so that person to be bound by them may acquire the knowledge essential to compliance. Underlying this requirement is a recognition that persons should not suffer negative consequences, whether a liability, obligation or penalty, due to the application of a law or rule of which they could not possibly be aware.

The Regulations Act requires that regulations be published in The Ontario Gazette within one month of filing with the Registrar of Regulations.[331] Although a regulation generally comes into force and has effect on and from the time of filing, a regulation that is not published is not effective against a person who has not had actual notice of it.[332]

330 Ibid., s. 12(3). The Committee is known as the Standing Committee on Statutory Instruments. It has adopted principles recommended by the McRuer Report (p. 378) to guide its examination of regulations. Ont., Leg. Ass., First Report of the Standing Committee on Statutory Instruments, at 10-11.

331 S. 5(1); also The Official Notices Publication Act, R.S.O. 1970, c. 303, s. 2(b).

332 The Regulations Act, s. 1(b).

The fundamental question is what matters are included within the statutory definition of "regulation." To the extent that a rule or directive is within the definition and not otherwise exempt, it will be available and not be within the concept of secret law. The crucial section follows:

> "regulation" means a regulation, rule, order or bylaw of a legislative nature made or approved under an Act of the Legislature by the Lieutenant Governor-in-Council, a minister of the Crown, an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor-in-Council... 333

The difficult task is to discern the meaning of the phrase "of a legislative nature." The other criteria in the definition may apply to certain guidelines or manuals or policy statements on a liberal reading. For example, one can possibly regard a manual as being "made ... under an Act of the Legislature ... by an official of the government" if it is issued by a minister or deputy minister to ministry staff responsible for making the actual decisions. Whether such a manual is "of a legislative nature" cannot be readily answered.

The problem has been to distinguish a "legislative act" from an "administrative act," the latter being free from a publication requirement. The distinction has not been clearly elucidated. Unfortunately, a recent decision of the Supreme Court of Canada has

333 The Regulations Act, s. 5(3).

not clarified it.[334] Two learned commentators have addressed the question in the following terms:

> The distinction between legislative and administrative acts is usually expressed as being a distinction between the general and the particular. A legislative act is the creation and promulgation of a general rule of conduct without reference to particular cases; an administrative act is the making and issue of a particular case in accordance with the requirements of policy ... Since the general shades off into the particular, to discriminate between the legislative and the administrative by reference to these criteria may be a peculiarly difficult task, and it is not surprising that the opinions of judges as to the proper characterization of a statutory function are often at variance. 335

> The meaning of "legislative" and "executive" may be determined by reference to the nature of the action. By this test, a power to make rules of general application is a legislative power and the rule is a legislative rule. A power to give orders in specific "cases" is, by the same test, an executive power and the order is an executive order. Similarly, a power to take specific action is an executive power and the action is an executive action. The difficulty here is that of distinguishing between what is "general" and what is "specific". These words, although they have some extreme and easily recognizable forms do not help to solve the doubtful cases. The matter is finally one for arbitrary decision. 336

Although the distinction between administrative act and legislative act is vague, these quotations suggest that "legislative nature" implies at least a rule, in the sense of a binding direction applicable generally, as opposed to a guideline or a manual that explains

334 Martineau v. Matsui Inmate Disciplinary Board [1978], 1 S.C.R. 118; 79 D.L.R. (3d) 1. Also see comment by H.N. Janisch, (1977), 55 Can. B. Rev. 576.

335 de Smith, supra note 35, at 60.

336 J.A. Griffith and H. Street, Principles of Administrative Law, (London: Pitman, 1967) at 49.

alternatives or relevant factors in the exercise of discretion, but does not compel a result. Many directives and manuals are of the latter character and only facilitate and clarify discretion. Consequently they would not be classified as being "of a legislative nature."

The McRuer Report similarly emphasized the rule or binding quality as being crucial to whether mandatory publication should be required.

> The real difficulty with respect to publication does not arise from subordinate legislation that comes within the definition of "regulations" as contained in the statute, but with respect to legislation that does not come within the definition. The definition of "regulations" should be expanded to include as far as possible all regulations, rules or bylaws that make law affecting the public, except municipal bylaws; e.g. regulations covering the admission to, and the suspension or expulsion from, self-governing professions or bodies should come within the Act. The expanded definition should include all rules made in the exercise of sub-delegated power. It is an unjustified encroachment on the rights of the individual to be bound by an unpublished law. 337

The final sentence is clearly a pronouncement of unquestionable truth. Whether it is any less of an unjustified encroachment on the rights of the individual to be affected by determinations in which standards or criteria are applied without his knowledge is the present issue. The rationale underlying the statement suggests that a distinction should not be recognized. A person can no more make his conduct conform with a secret guideline or manual than to an unpublished law. The negative consequences of failure to comply, whether the denial of a benefit or

337 Report of the Royal Commission Inquiry into Civil Rights, supra note 34, at 366.

the imposition of a penalty, ensue in either case. The concept of a fair hearing encompasses the requirement that an affected party must know the case against him so that he may answer it. Certainly that general principle is violated when factors to be considered by the decision-maker are not brought to the attention of the party concerned.

The MacGuigan Report stated that the many circulars, directives and manuals used in decisions were "in essence" regulations affecting members of the public.[338] Although their impact on decisions was similar to that of regulations, publication was not required due to the application of the definition of "regulation" in The Regulations Act,[339] and the difficult administrative-legislative distinction. Consequently, the Report recommended that the definition of "regulation" be amended so that most guidelines and directives would be included within its ambit and hence subject to publication. The Report further recommended that "... all departmental directives and guidelines as to the exercise of discretion under a statute or regulation where the public is directly affected by such discretion should be published and subjected to parliamentary scrutiny."[340] This approach rejects the distinction between administrative or executive and legislative as being

338 Third Report of the Special Committee on Statutory Instruments, supra note 322, at 13.

339 S.C. 1970-71-72, c. 38.

340 Third Report of the Special Committee on Statutory Instruments, supra note 322, at 29.

determinative of the issue of publication. It is a recognition of the functional significance of secret law in decisions affecting individual rights.

4. Discretion,[341] the Administrative and Judicial Responses

The possession of discretionary power by individuals and administrative bodies is the central factor underlying the existence of secret law. Discretion may be conferred pursuant to an express grant, such as when legislation provides that a decision be rendered according to the opinion of the decision-maker. In most cases, however, the existence of discretion is implicit. Statutory language may be vague or general, so that a decision as to whether the language should apply must be made in every case. Even when statutes and regulations have apparently set out detailed and explicit conditions governing the exercise of a statutory power, discretion may exist nevertheless because the conditions are not described in sufficient detail to encompass all possible situations. Whatever its source, discretion forces the decision-maker, whether an individual or a board, to select among

341 Much of the following discussion is based on two articles: H.L. Molot, "The Self-Created Rule of Policy and Other Ways of Exercising Discretion" (1972) 18 McGill L.J. 310, and Galligan, supra 324. For a recent discussion, see J.H. Grey, "Discretion in Administrative Law" (1979), 17 Osgoode Hall L.J. 107.

alternative courses of action within the bounds of good faith and reasonableness.

The power to choose among alternatives poses problems for the decision-maker. It requires that each case or application be weighed to ascertain which alternative should apply in that specific situation. This problem is particularly acute when a decision-maker is entrusted with the responsibility to make thousands of decisions, many of which are of a similar nature. Administrative efficiency demands an expeditious treatment of each case before him, but the uncertainty created by the discretion militates in the opposite direction. There is also the basic desire for justice, in the sense that similar cases should be treated in a similar manner. Such coherence is very difficult to achieve when the volume of cases necessitates that a number of people make decisions. This dilemma has been graphically described:

> If we adopt the traditional picture of decision-making, the non-judicial decision-maker seems to be in a bind. He faces a great many cases, each of which poses the same question: Do we grant the loan? Do we admit the applicant? Do we grant permission? A few of the cases before him call for an obvious decision one way or the other; but the vast majority do not. He must decide them, but he cannot do so by flipping a coin or by digging into every file. Flipping a coin is irrational, irresponsible, and demeaning. Digging into every file not only takes too much time, it gets him nowhere; the deeper he digs the less able he is to decide. The solution, and it is uniformly adopted, is to move away from deliberating about each case and to construct or settle on one criterion which can be mechanically applied to all the cases. 342

342 S. Wexler, "Non-Judicial Decision-Making" (1975) 13 Osgoode Hall L.J. 839, at 846.

Pressures caused by lack of time and the desire for consistency lead to the development of a generalized approach to the exercise of discretion, perhaps assuming a concrete form as a manual or a compilation of guidelines. In directing choices in this manner, the intention of the individual or agency entrusted with the discretion is to influence future decisions, based on a selection of the most desirable of alternative courses of action. In essence, this is a form of policy-making. Although this is more likely to occur in the context of a decision-making process in which a great number of decisions are made by many persons, an administrative board or tribunal possessing a formalized hearing function may resort to a generalized approach to the exercise of discretion. It may formulate policies by which it is to be guided and may rely on its prior decisions as a source.[343]

The courts have responded to this development by permitting adoption of the tools of policy-making -- directives, policy statements, manuals, guidelines -- but have restricted their effect by a doctrine known as "fettering discretion." This doctrine prevents such materials from having the binding effect of a statute or regulation. The following is the classical judicial statement of the concept:

343 Re Hopedale Developments Ltd. v. Town of Oakville, [1965] 1 O.R. 259 at 263 (C.A.); Re Township of Westminster and City of London (1975), 5 O.R. (2d) 401 at 413 (C.A.); Capital Cities Communications Inc. et al v. CRTC, [1978] 1 S.C.R. 141; 81 D.L.R. (3d) 609 at 629 (S.C.C.); British Oxygen Co. v. Board of Trade, [1971] A.C. 610 at 624-625 (H.L.).

> There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case. ... if the policy has been adopted for reasons which the tribunal legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes. 344

Although this statement is apparently confined to tribunals that are responsible for the conduct of hearings, the rule should be read in a wider context to include any person or body having a statutory power of decision. The doctrine means that an administrative body or individual given a power of decision by statute must consider the merits of every case before it. Consequently a policy cannot be followed as if it was a binding rule because this necessarily implies that the mandatory discretion has been forsaken in deference to it. The decision-maker that improperly relies on a policy has not fulfilled a statutory obligation to exercise discretion. It has acted ultra vires or without jurisdiction, and will be subject to judicial review on that basis. The result of the application of this principle is that policies adopted by a decision-maker should be drafted and treated only as guidelines, not as norms compelling a certain result. If a policy is expressed in the form of a rule, the decision-maker must nevertheless consider whether the rule should have effect in the individual cases before him. In each

344 R. v. Port of London Authority, ex parte Kynoch, [1919] 1 K.B. 176 at 184.

case, an affected person must be afforded the opportunity to demonstrate that the policy, whether in the form of rule or guideline, should not apply.

The protection afforded to the individual with respect to guidelines, manuals, policy statements and directives depends on the difficult distinction between an "administrative" decision as opposed to "judicial" and "quasi-judicial" activity. An administrative decision-maker subject to the rules of natural justice must permit an individual an opportunity to meet the case against him. To the extent that it includes a settled policy, the nature of that policy should be made known to the party or parties. Failure to do so would constitute a violation of the rules of natural justice in the same way as would neglecting to disclose adverse evidence or reports which have been considered by the tribunal. Thus, where there is a hearing, the party before the tribunal should be informed of the policy in question, and afforded the opportunity to argue whether it should be applied.

When an individual is not entitled to a hearing and the rules of natural justice do not control procedures, the result is radically different. If the rules of natural justice do not apply, one cannot contend that a failure to reveal a policy is a defect unless the novel concept of "fairness"[345] can be taken to incorporate such protection. Moreover, without a hearing, an individual is denied the opportunity to argue that

345 See text accompanying notes 57-59, supra.

his particular case should be decided without reliance on the policy or rule. Unless the decision-maker provides reasons indicating that the policy was in fact applied as a binding rule and discretion was effectively abandoned, a person will have no basis on which to allege that the decision-maker failed in his statutory duty to exercise individuated discretion.

In sum, out of their concern for the proper exercise of discretion, courts have in effect required secret law to be made available in the limited circumstances of decision-making circumscribed by the rules of natural justice. Judicial interest has not extended beyond these narrow confines to other administrative activities, nor to the secret law issue generally.

B. Secret Law in Ontario

The phenomenon of so-called "secret law" exists in Ontario. Decisions concerning individual rights and entitlement to benefits are affected by a generally unknown and inaccessible body of rules, interpretations and guidelines. Even the small sample of decision-makers examined during this study indicated that secret law is an integral facet of the administrative process in Ontario.

The pattern of use of secret law should occasion no surprise for the reasons canvassed in the above discussion. With a single exception,

the administrative tribunals and boards surveyed do not rely on secret law for guidance. Apparently this is a consequence of two factors; firstly, their perception of their role, and secondly, the effect of the rules of natural justice. Administrative boards and tribunals regard their mandate as being the interpretation of the applicable legislation in the context of particular cases. The legislation is the sole guide. To some extent this position is modified in the case of tribunals that regard their earlier decisions as a source of rules or policies that influence the exercise of discretion. Whether prior decisions will have this character depends on the attitude of the board or tribunal towards precedent. Certain boards do not ascribe any precedential significance to their prior decisions, while others adopt a more judicial approach, infusing decisions with impact ranging from a persuasive influence to a binding effect on an instant case. If a tribunal has a policy, the rules of natural justice should compel its disclosure to a party, whether it is found in an earlier decision or is enunciated independently of any decision.

An exception to the general rule that boards and tribunals do not rely on secret law is the Assessment Review Court. Certain educational materials are issued to the judges or members of the Court. Although these materials may influence or control the exercise of discretion by the members, they are not available to the public.

Policy guidelines control the exercise of discretion by persons responsible for making decisions in the Provincial Benefits Branch and

the Vocational Rehabilitation Services Branch of the Ministry of Community and Social Services. Three factors have promoted the use of these manuals. Both branches of the Ministry are required to make a great number of decisions.[346] The enormous volume of decisions and the desirability of speed in individual adjudication necessitates the delegation of decision-making responsibility to many employees in the Ministry. In addition, the legislative schemes being administered involve decisions demanding the exercise of discretion. In some cases the discretion is conferred directly by statute and the regulations. In others, discretion exists as a consequence of the use of general language in the legislation, capable of more than one interpretation. The manuals are designed to control the exercise of discretion so that there is a consistent application of policy and expeditious determination of applications. To the extent that the policy guidelines explain certain discretionary areas in the legislation, the delegate of the decision-making power is relieved from a deliberative responsibility that would have required greater thought and time.

The significance of the manuals can best be appreciated by a brief discussion of how they are used in the context of the individual legislative schemes.

346 During the past fiscal year, 6,578 persons were referred to the Vocational Rehabilitation Services Branch. A total of 12,772 received one or more services from the Branch. A total of 232,850 persons received benefits from the Provincial Benefits Branch. Ont., Ministry of Community and Social Services, 47th Annual Report (Toronto: Ministry of Community and Social Services, 1978) at 6-8.

1. Provincial Benefits Branch

The province administers a system of benefits and allowances for persons in need under The Family Benefits Act. The Director of the Provincial Benefits Branch is responsible for decisions respecting the entitlement of applicants and determinations of the amounts to which they are entitled in accordance with the legislation. The Act provides that decisions may be delegated to any employee or class of employee of the Ministry, and any decision made by a delegate is deemed to be a decision of the Director for the purposes of the Act.[347]

The Director has compiled a set of policy guidelines in a manual for use by personnel in making decisions about applications. The manual's title, "Procedural Guidelines for Administration of the Family Benefits Act and Regulations," does not accurately reflect its content. Its overwhelming emphasis is on the explanation and interpretation of the relevant legislation, rather than the internal administration of the Provincial Benefits Branch. The nature of the manual is best expressed by the introductory remarks contained in the Foreword:

> The Directives ... are intended to clarify those parts of the Act and Regulations which provide some discretionary power to the Provincial Benefits Branch, to offer an interpretation of the legislation where required or to provide guidelines to initiate caseload management from the district office.

347 Decisions are made by 132 people, most of whom are clerks known as "eligibility analysts". There are 99 eligibility analysts, 12 review analysts and 21 unit supervisors. The eligibility analysts have a civil service classification of "Clerk 4, General".

> The Directives clarify the extent to which the Director's authority is delegated and to whom. They will also clarify the information necessary to satisfy certain requirements in the Act in reaching a decision.

The guidelines explain certain terms and expressions found in the legislation. Section 1(e)(i) of The Family Benefits Act requires that a dependent child be making "satisfactory progress" with his studies. Sections 7(1)(b)(ii) and 7(1)(d)(ii) of the Act provide that a woman may be eligible for assistance if her husband has "deserted" her for three months or more, and she is considered to be a person in need. Calculation of income includes income from wages, salaries and "casual earnings" other than casual earnings of a dependent child. Each of the terms quoted -- satisfactory progress, deserted, and casual earnings -- are explained further in the guidelines.

Several areas in the legislation explicitly require the exercise of judgment or discretion. Where the director is not satisfied that an applicant or recipient is making reasonable efforts to obtain compensation or realize any financial resource to which the applicant or recipient may be entitled, the Director may determine that the person is not eligible for a benefit or may reduce the amount of the allowance.[348] In the context of an application for assistance by a deserted woman, the guidelines explain what constitutes "reasonable efforts." Where an applicant or recipient has an interest in real

348 R.R.O. 1970, Reg. 287, s. 8a.

property other than real property used as a dwelling place, the applicant is not eligible for an allowance unless there is an arrangement or disposition of the estate or interest advantageous for the care of the applicant's or recipient's family.[349] The factors to be considered in this determination are set out in the guidelines.

Section 11(2)(a) of the regulations allows the Director to increase the budgetary requirements for fuel up to the actual or anticipated cost, if the amount set out in the regulations is not sufficient. The guidelines list relevant factors to be weighed in making this decision.

Occasionally the manual supplies policy in areas on which the legislation is silent. For example, the regulations provide that a calculation of income shall include all payments of any kind or nature received by an applicant or recipient. No mention is made of the rental of land. The guidelines clarify this question in order to compensate for this omission. In so doing, the guidelines come very close to performing a legislative function.

The guidelines manual is not available to members of the public notwithstanding its intended influence. Three reasons were given for the policy of confidentiality. The Director regarded the policy guidelines as containing "internal administrative procedures." It may be argued, however, that this characterization does not accurately

349 Id., s. 7.

describe the effect of the manual. There is also fear that it will be misinterpreted by persons who do not appreciate the entire context of the manual and the policy it seeks to implement. Finally, the Director noted that the manual, although a guide for the exercise of discretion by subordinates, is not binding and may be waived for compassionate reasons.

2. Vocational Rehabilitation Services Branch

The Vocational Rehabilitation Services Branch administers a legislative scheme under which disabled persons may apply to receive vocational rehabilitation services pursuant to The Vocational Rehabilitation Services Act. Section 7a of the Act confers on the Director of the Branch the responsibility to determine whether each applicant is eligible for the services, and the amount and nature of services where eligibility is established. The powers and duties of the Director, including the power of decision, may be delegated to any employee or class of employee in the Vocational Rehabilitation Services Branch of the Ministry.[350] Any decision, order or directive of a person to whom the powers and duties of the Director has been delegated is deemed to be a decision, order or directive of the Director.[351]

350 The Vocational Rehabilitation Services Act, s. 7(3).

351 Id., s. 7(4).

The organizational structure of the Branch and the burden of its caseload has necessitated substantial delegation of the power of decision to employees of the Ministry. The Vocational Rehabilitation Services Branch is decentralized, consisting of a field staff of 212 counsellors and supervisors in 43 offices. The Branch also provides grants to six agencies in the Metropolitan Toronto area possessing special expertise in dealing with certain disabilities. Apart from decisions respecting learning disabilities and the amount of maintenance allowances, all decisions concerning eligibility and the provision of services are made at the local level. Decisions regarding learning disabilities and the quantum of maintenance are centralized and are made by the Director.

The Vocational Rehabilitation Services Act and regulations comprise a skeletal piece of legislation. Even the question of eligibility, the crucial issue on which entitlement to services depends, is left to be resolved by the application of very broad and general language. A person will be eligible for vocational rehabilitation services if he or she is a "disabled person," which the Act defines to be "a person who because of physical or mental impairment is incapable of pursuing regularly any substantially gainful occupation as determined by the regulations." Although the concept of a "substantially gainful occupation" is subsequently explained in the regulations, there is no guidance in the statute or regulations as to the nature and extent of physical or mental disability that will render a person eligible within the meaning of the definition.

The Act describes the kinds of goods and services provided by the Branch in language so general that one cannot discover what is available from a perusal of the legislation alone.

The Director of the Vocational Rehabilitation Services Branch has issued a series of policy guidelines to persons entrusted with the power of decision under the Act, including district directors, supervisors, counsellors and approved agency counsellors. The introduction to the manual describes its intended function:

> The Policy Guidelines are intended to provide a framework for the interpretation of the Legislation to assist counsellors and Selection Committees in planning and decision making. Hence, the Policy Guidelines do not stand alone and should be used in conjunction with the Act and Regulations ...
>
> Since these guidelines cannot anticipate all eventualities, due to the broad range of the program and client population, it is expected that District Selection Committees and Supervisors identify new or atypical situations or service requests and seek consultation with the Branch prior to their decision.
>
> The guidelines should be read in context, and with common sense. They are not written in the manner in which legislation is written, nor would that be desirable for a working policy manual. Wherever a policy is ambiguous, please contact the Branch for consultation. The ability to appropriately utilize the flexibility built into the guidelines can have a direct effect on the extent to which they remain flexible. (emphasis added)

The policy guidelines provide a more detailed explanation of many concepts in the legislation and the services available to disabled persons. The meaning of eligibility is expanded upon. The effect of various factors -- age, financial ability, employment, eligibility for other programs -- on the eligibility of an applicant are explored in

the guidelines. Whether certain physical, emotional and mental disorders will render an applicant eligible for vocational rehabilitation services is considered in the guidelines. Thus, there is a substantial body of internal policy concerning the eligibility issue, particularly in view of the relatively limited guidance afforded by the legislation.

The manual sets out the goods and services available to applicants and the conditions under which the various alternatives may be provided to clients. The statute merely lists the categories of services in a very general manner. The guidelines describe what are the alternative goods or services to which a disabled person may be entitled within each category. For example, section 5(a) provides that a rehabilitation program may provide "appliances designed to support or take the place of a part of the body or to increase the acuity of a sensory organ." The guidelines describe the range of available restorative applicances services.

Section 5(d) provides that the Branch will pay the "costs of ... training, prevocational training, work adjustment training and personal adjustment training, including books and training materials." What kinds of training -- university, summer courses, employee training, on-the-job training -- may be provided can be found in the manual, together with the policies that will affect a decision as to which alternative is appropriate for an applicant. As well, the manual enunciates policy with respect to related issues on which the

legislation is silent, such as the effect of academic failure or delinquent attendance on continuing entitlement to services.

The policy guidelines manual is treated as a confidential document by the Vocational Rehabilitation Services Branch. Employees receiving it are instructed in its introduction that it "... is an internal document and under no circumstances should [it] be given to anyone outside the program." A person wishing to examine the manual must request access from the central Branch office. In fact, the guidelines have been reviewed by a number of interested organizations, including the Ontario March of Dimes and the Ontario Advisory Council on the Physically Handicapped.

The reason for the current policy was expressed to be apprehension about its possible misinterpretation by persons unfamiliar with the legislation. A second reason was the fear of harassment of Branch personnel by clients demanding services described in the manual. Many persons included in the client group have severe psychological and emotional problems that cause them to be very difficult for Branch staff to deal with. There is concern that disclosure of the manual revealing the details of the determinative process may contribute to such persons becoming more "unreasonably assertive and demanding." Whether the disclosure of the manual would impair the efficiency of the program is certainly a relevant issue to the question of its accessibility. However, there should be some evidence as to the probability of the apprehended effect before it can be accepted as a factor in a decision whether or not to expose secret law.

Finally, it should be noted that the policy guidelines manual is a document of some force. Before a counsellor or supervisor may deviate from it, the decision must be submitted to the Director for his approval. This suggests that although the manual is not formally binding, it indeed has a legislative effect; it is studiously followed by persons in the determination of the questions confided to them by the Act and regulations.

3. Assessment Review Court

The Assessment Review Court makes use of a variety of materials supplementary to the legislation. Certain materials, though, are not of interest in the context of secret law, as they are administrative in nature and instruct support personnel in duties unrelated to the determination of complaints under The Assessment Act. Included in this category are several manuals: a forms guide, a data processing manual, and a court clerk's guide for the use of the court clerks.

Other materials may have an effect on decisions. There is, for example, a general policy and procedures manual, known as the "Member's Guide," intended for the instruction of the registrars and the 91 members of the court. It is an educational manual of a very general nature that explains the jurisdiction of the Assessment Review Court, the duties of the court clerks and members of the court, the hearing procedures and the method of assessment.

Periodically the Chairman of the Assessment Review Court issues directives to members of the court. Their purpose is to provide more detailed information than that contained in the manual. They draw attention to published articles or bulletins (including technical bulletins of the Institute of Municipal Assessors of Ontario) or they may discuss the meaning and significance of recent decisions of the Assessment Review Court, the Ontario Municipal Board and other courts.

Two factors have tended to promote the use of the supplementary materials. Firstly, many members of the court are not lawyers, so that careful explanation of certain legal concepts and procedures, including The Statutory Powers Procedures Act, 1971, is essential to ensure consistent and fair procedures. Secondly, real property assessment is a very technical and complex field, the principles of which are subject to modification by decisions of the Ontario Municipal Board and the courts. It is critical that members of the court responsible for decisions are sufficiently knowledgeable and constantly apprised of changes in principles and approach with respect to assessment.

The current policy is that the manuals, including the educational manual and the directives, are not available to members of the public. The policy of non-disclosure is not based on a defined policy of confidentiality designed to protect any articulated interest. Indeed, most of the materials are available in another form or in other places. The concepts and procedures explained in the Member's Guide are very

general, and do not reflect policy in the sense that policy has been discussed thus far. Many of the articles and bulletins are published elsewhere and are otherwise available. Any judicial decisions and decisions of the Ontario Municipal Board may be found in reports and can be found in files of the Board or the courts.

To the extent, however, that directives concerning decisions instruct members of the court to regard them as influential or binding, there is a secret law issue if they are not disclosed. Members of the public should be made aware of the attitude of the Assessment Review Court to these decisions if they are in any way considered to be precedent. The Assessment Review Court, as a body to which the rules of natural justice apply, should of course indicate to parties appearing before it whether it is in fact considering a policy so that the parties may make submissions with respect to the application of that policy. Failure to do so could be a violation of the rules of natural justice because a party would not be apprised of the case against him.

4. Discussion

The manuals employed by the Vocational Rehabilitation Services Branch and the Provincial Benefits Branch clearly have an impact on individual decisions. Whether the various internal directives issued by the Chairman of the Assessment Review Court to the court members have a significant influence on their approach to individual cases cannot be

stated with certainty. However, one can assume that these directives are not distributed to court members in the expectation that that will be ignored. They must be intended to provide at least some guidance in future decisions.

These materials should be disclosed to the public. This suggestion is consistent with elemental fairness and the Rule of Law.

The reasons for their continuing secrecy are not persuasive. Both the Vocational Rehabilitation Services Branch and the Provincial Benefits Branch argue that this policy is supported by a fear that the guidelines will be misunderstood by persons unfamiliar with the context in which the policies were developed. That may be true, but it is not a reason that justifies secrecy. If public comprehension is desirable, this policy will certainly not facilitate it. Furthermore, such an argument supports the secrecy of legislation. People without legal training probably do not understand statutes or regulations, and may misinterpret their meaning and intent on reading them. Yet we do not prevent individuals from having access to legislation. Members of the public may obtain the aid of persons with the requisite legal training or experience to explain statutes and regulations. Surely similar help could be available to interpret secret law.

Other persons contend that non-disclosure is justified because the manuals are not formally binding. Indeed, they are not legally binding on a court of law or an administrative tribunal. Nor are they

administratively binding. Often they are waived on grounds of compassion or for other reasons. However they are binding in a practical sense. When they are secret, there is no means of challenging the policies contained in the manuals since their content or very existence is unknown to the affected person. If a decision is appealed, the application of the policy in that single case may in effect be reversed by a decisions of appellate body, even though the policy is not presented to it for consideration. Manuals have never been introduced in hearings before the Social Assistance Review Board, the tribunal responsible for appeals from decisions of the Provincial Benefits Branch and the Vocational Rehabilitation Services Branch. To the extent that an initial decision by either Branch is unchallenged, the manual is practically binding regardless of its formal legal status. In this context, many people lack the will and financial resources to appeal decisions beyond the initial stage, making the first decision critical. This is the stage at which the guidelines are employed.

Finally, the manuals should be disclosed if one is truly concerned about ministerial responsibility. Both the McRuer Report and the MacGuigan Report argued that responsibility for policies should rest on persons and bodies subject to political control. In theory, the Minister of Community and Social Services is responsible for policies adopted by the Vocational Rehabilitation Services Branch and the Provincial Benefits Branch. Thus there is formal political responsibility for the manuals through the Minister. However, political accountability is in fact

negligible if the public is not apprised of the policies. One cannot question matters of which one is unaware.[352]

Other jurisdictions have exposed secret law to public scrutiny. Their different approaches reveal alternative mechanisms and procedures that merit consideration. Deficiencies in their statutes warn of problems that can be avoided.

C. The Approach to Secret Law in Other Jurisdictions

1. The United States

The Freedom of Information Act has effectively solved the secret law problem in the United States. Although certain fine questions of interpretation remain,[353] the statute compels disclosure of secret

352 The Workmen's Compensation Board has decided to reverse its former policy of keeping its internal adjudicative manuals secret. In testimony before the Select Committee on the Ombudsman, on February 26, 1979, Board representatives announced that they had begun to consult with the Publications Service of the Ministry of Government Services with a view to publication and distribution in the summer of 1979. See Workmen's Compensation Board News Release, "WCB Makes Policy Manuals Available to the Public", May 22, 1979.

353 See generally K.C. Davis, Administrative Law of the Seventies (Rochester, N.Y.: Lawyers Cooperative Publishing Co., 1976) at 72-81; Marwick, supra note 279.

law, either by requiring its publication or its availability to the public. Furthermore, sanctions are provided to encourage agency compliance.

a) Publication Requirement

Section 552(a)(1) requires the publication of certain materials in the Federal Register. The Federal Register is a magazine published daily by the Office of the Federal Register under the authority of The Federal Register Act[354] and the regulations of the Administrative Committee of the Federal Register.[355] It is roughly analogous in function and format to The Ontario Gazette.

Four classes of agency materials must be published in this manner:

> A) Descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> B) Statements of the general course and method by which agency functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> C) Rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports or examinations;

354 44 U.S.C. s. 1501-11 (1970).

355 1 C.F.R. s. 1.1-22.7 (1974).

> D) Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.

The first category is self-explanatory.

The second requires each agency to explain its statutory duties and functions and how it is organized to execute those functions, including a description of its scheme of delegation. Agencies must explain how matters for which they are responsible are initiated, processed, channelled and determined. The purpose is to enable a member of the public to ascertain which persons within a government organization are authorized to make the decisions in which he is interested.

The third category includes rules, forms, instructions and papers that are used by and in relation to the public. It does not require disclosure of internal administrative forms and similar materials.[356]

Paragraph (D) requiring the publication of "substantive rules of general applicability adopted as authorized by law" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency" is the most difficult of the publication requirements. The precise meaning of each of "statements of general

356 United States Department of Justice, Attorney-General's Memorandum on the Public Information Section of the Administrative Procedure Act (Washington: U.S. Government Printing Office, 1967) at 10.

policy" and "interpretations of general applicability" is unclear and has not yet been elucidated by judicial interpretation.[357] This is a confusion of some consequence because "interpretations of general applicability formulated and adopted by the agency" must be published and "interpretations which have been adopted by the agency" need not be published, but must be made available. The inability to distinguish the two kinds of interpretative rules renders it impossible to state conclusively what in fact must be published in the Federal Register.

The first clause of subsection (D) refers to rules made in the exercise of a law-making power granted by statute. The second clause compels publication of rules and policies used by agency staff to facilitate their interpretation of the statute or regulations being administered.[358] It is not intended to include rules, policy statements and interpretations that do not concern the general public and deal with internal matters, such as policies respecting personnel.[359] A difficult question with respect to this section is whether general policies and rules articulated in individual decisions are included within the subsection.[360]

357 Davis, supra note 353, at 72.

358 "Project: Government Information and the Rights of Citizens" (1975), 73 Mich. L. Rev. 971 at 1032.

359 Attorney-General's Memorandum (1967), supra note 356, at 10.

360 Davis, supra note 304, at 768-770; "Project", supra note 358, at 1032.

An administrative sanction for failure to comply with the publication requirements was included as an incentive to agency compliance.[361] A person may not be "adversely affected" by any matter not published in the federal register as required by the section, unless he has had actual and timely notice of the matter. Thus, a person may not lose his entitlement to a benefit or be subject to a liability pursuant to unpublished materials.[362]

b) Requirement to Make Materials Available

Section 552(a)(2) requires three classes of information to be made available for public inspection and copying unless the materials are offered for sale:

a) Final opinions, orders, including concurring and dissenting opinions, as well as orders made in the adjudication of cases;

b) Statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

c) Administrative staff manuals and instructions to staff that affect a member of the public.

The meaning of the first category has been the subject of considerable disagreement. Controversy has centered on the precise meaning to be given to the terms "orders," "opinions" and "adjudication," leading to

361 S. Rep. No. 813, 89th Cong., 1st Sess. at 6 (1965).

362 "Project", supra note 358, at 1033.

doubt as to which agency orders and opinions must be made available. For the purposes of this study, it is unnecessary to discuss this debate except to note that the drafting of the subsection and its interpretation by the United States Justice Department has attracted criticism from several learned commentators.[363]

The second category requires agencies to make available "statements of policy and interpretations which have been adopted by the agency" that are not "general" or "of general applicability." Otherwise their publication would be required. Both the expression "statements of policy" and the term "interpretations" have been defined. The former refers to "statements which articulate a settled course of action which will be pursued in a class of matters entrusted to agency discretion."[364] Interpretations are "explanations or clarifying applications of laws, regulations, or statements of policy."[365] The subsection includes statements and interpretations issued to agency personnel by an authoritative person within an agency hierarchy. This subsection compels disclosure of materials establishing criteria, standards and other considerations used by agency personnel in making decisions. There

363 "Project", supra note 358, at 1034-1035; Attorney-General's Memorandum (1967), supra note 356, at 15; Davis, supra note 304, at 770-772; United States Department of Justice, Attorney-General's Memorandum on the 1974 Amendments to the Freedom of Information Act (Washington: U.S. Government Printing Office, 1975) at 19-20; Davis, supra note 353, at 75-77.

364 Attorney-General's Memorandum (1975), supra note 363, at 21.

365 Id.

is a question whether it would include, for example, an opinion about policy given to a person as a result of an individual inquiry as to the application and interpretation of a statute or regulations to his particular situation.[366] Some authority suggests that an opinion must be made available only if cited or relied on by agency personnel in subsequent cases. However, certain judicial interpretations have doubted whether the precedential significance of the materials should be a factor determining disclosure.[367]

The final category forces disclosure of "administrative staff manuals and instructions to staff that affect a member of the public." The manuals and the instructions must both be "administrative" and "affect a member of the public" to be within the ambit of the subsection. Its purpose is to provide individuals with information necessary to effective interaction with an agency. It is an explicit recognition that these materials may be determinative of an agency decision, and in their application by agency staff, are essentially a form of agency law.[368] A distinction between "administrative" and "non-administrative" manuals and instructions was made to restrict the availability of manuals and instructions "to those which pertain to administrative

366 H.R. Rep. No. 1497, 89th Cong., 2d Sess. at 7 (1966); Attorney-General's Memorandum (1967) supra note 356, at 16.

367 Attorney-General's Memorandum (1975) supra note 363, at 21.

368 S. Rep. No. 813, supra note 361, at 2.

matters rather than law enforcement matters."[369] The policy underlying this distinction is to avoid disclosure of instructions and manuals that would reveal information and procedures which, if known, would impede government performance of functions. Thus, directives to staff concerning strategy for pending contract negotiations would not be included.[370] Moreover, it was intended to exclude law enforcement matters and to "[protect] the confidential nature of instructions to government personnel prosecuting violations of law in court, while permitting a public examination of the basis for administrative action."[371] Subsequent judicial interpretation has reduced the scope of this limitation. Law enforcement materials are not per se protected from disclosure. Only matters the disclosure of which would significantly obstruct the enforcement process are excluded from the operation of the subsection.[372]

Subsection 552(a)(2)(c) was not intended to apply to manuals and instructions that do not concern the public. Materials respecting

369 Attorney-General's Memorandum (1967), supra note 356, at 16; H.R. Rep. No. 1497, supra note 366, at 7.

370 S. Rep. No. 813, supra note 361, at 2; Attorney-General's Memorandum (1975), supra note 363, at 21-22.

371 S. Rep. No. 813, supra note 361, at 2; Attorney-General's Memorandum (1967), supra note 356, at 17.

372 Attorney-General's Memorandum (1975), supra note 363, at 22; "Project", supra note 358, at 1036-1037; Hawkes v. I.R.S., 467 F. 2d 787 (6th Cir., 1972), affirmed after remand, 507 F. 2d 481 (6th Cir., 1974); Stokes v. Brennan, 476 F. 2d 699, at 701 (5th Cir., 1973).

agency equipment and inventory, personnel or accounting procedures and similar matters are not included.[373]

The general duty to make certain materials available is modified by an exception. "To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes on an opinion, statement of policy, interpretation or staff manual or instructions." This attempts to reconcile the public right to know with the right of the private citizen to maintain the inviolability of personal affairs having no public inpact.[374] It was intended to apply to both the financial matters and personal affairs of individuals.[375] The authority to protect individual privacy cannot be used by agencies to delete unintended information contrary to the general policy of disclosure and the public availability specifically required. Judicial interpretation has allowed agencies to delete the minimum amount of information necessary to secure privacy, which usually reduces to names and addresses.[376]

373 Attorney-General's Memorandum (1967), supra note 356, at 17.

374 Id., at 19; S. Rep. No. 813, supra note 361, at 7; H. Rep. No. 1497, supra note 366, at 8.

375 Attorney-General's Memorandum (1967), supra note 356, at 19.

376 "Project", supra note 358, at 1040.

Moreover, when an agency expunges information pursuant to this power, it must provide a detailed written justification for the deletion sufficient to allay suspicion. In this way the integrity of the process is preserved.[377]

The Act does not require that the materials be made available in any prescribed manner, except to state that they must be "available for public inspection and copying." The United States Justice Department suggested that the provision of the materials in the public reading room of the agency would constitute satisfactory compliance. It further recommended that the charges levied in connection with the provision of these materials should only be the actual cost of copying.[378] Without a right to copy documents at a reasonable cost, the right to inspect is less meaningful, if not, for many citizens, a complete nullity.[379]

That a factor as apparently trivial as photocopying costs can dramatically affect substantive rights was demonstrated by the early history of the Act. Excessive agency charges for search and reproduction deterred individuals from attempting to use the Act, and effectively denied the statutory right.[380] In an effort to cure abuse, amendments

377 Attorney-General's Memorandum (1967), supra note 356, at 19.

378 Id., at 14.

379 S. Rep. No. 813, supra note 361, at 7.

380 H.R. Rep. No. 92-1419, 92nd Cong., 2d Sess., at 10, 53-58 (1972).

were passed respecting fees, requiring that "reasonable standard charges"[381] be levied for search and duplication.

Materials that are not published must be indexed. The indexes must be published "quarterly or more frequently" and distributed. The availability of the index was regarded as critical to the exercise of the rights under this subsection. Without an index or other method of bringing the existence of these materials to the attention of the public, a person would not be able to discover the existence of an order, opinion or policy statement relevant to his case.[382]

The mandatory publication of indexes is an extension of this attitude. The indexing requirement applies only to "any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published." The index itself need not be in any special form as long as it is "usable and concise"[383] and will allow a member of the public to select the needed documents from the mass of agency documents listed. If the index concerns subjects of a technical nature or demanding a certain expertise, the standard will be met if a member of the public can use the index with "specialized assistance."[384]

381 5 U.S.C. s. 552(a)(4).

382 S. Rep. No. 813, supra note 361, at 7; H.R. Rep. No. 1497, supra note 366, at 8.

383 H.R. Rep. No. 93-876, 93rd Cong., 2d Sess., at 5 (1974).

384 Attorney General's Memorandum (1975), supra note 363, at 18.

There is an exemption from the requirement to publish an index where the agency finds that its publication would be "unnecessary and impracticable," in which case the agency finding must be published in the Federal Register.[385] When an agency is of the opinion that public interest is insufficient to justify publication of an index in view of the effort and costs to be incurred, it may rely on this exception. However, it must nonetheless maintain the availability of the index for inspection and copying at a cost not greater than the direct cost of reproduction.[386]

There is a sanction for failure to comply with the indexing or publishing requirements. "A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may [only] be relied on, used, or cited as precedent against an agency against a party ... if (i) it has been indexed and either made available or published ... or (ii) the party has actual and timely notice of the terms thereof."[387]

385 5 U.S.C. s. 552(a)(2).

386 S. Rep. No. 93-854, 93rd Cong., 2d Sess., at 8 (1974); Attorney-General's Memorandum (1975), supra note 363, at 16-17.

387 5 U.S.C. s. 552(a)(2).

2. Australia

The Freedom of Information Bill 1978 was introduced in Parliament for first reading on June 9, 1978 so that its content remains a matter of debate and is subject to amendment. Notwithstanding undertainty about its final form, the Bill, as the culmination of prolonged careful study,[388] merits a close examination.

Part II of the Bill imposes obligations to make secret law available on Departments of the Australian government and statutory bodies, including administrative boards and tribunals.[389]

a) Publication Requirement

The responsible minister of an agency must publish (1) a statement setting out particulars of the organization and function of the agency

388 Australia, Attorney-General's Department, Report of Interdepartmental Committee, Proposed Freedom of Information Legislation (Canberra: Australian Government Publishing Service, 1974); Australia, Attorney-General's Department, Report of Interdepartmental Committee, Policy Proposals for Freedom of Information Legislation (Canberra: Australian Government Publishing Service, 1976).

389 To ascertain the scope of the statute, one must carefully examine the important definitions -- "agency", "department", "prescribed authority", "responsible Minister", "principal officer" -- and section 5 which exempts courts and certain arbitral bodies. Also see The Parliament of the Commonwealth of Australia, The Senate, Freedom of Information Bill 1978: Explanatory Memorandum (circulated by the Attorney-General, Senator the Honourable P.D. Durack, Q.C.) at 1-2.

indicating decision-making powers and other powers affecting members of the public, and (2) a statement of the categories of documents maintained in the possession of the agency. This requirement may be satisfied by publication in the Commonwealth Government Directory.

The purposes of publication are to facilitate public comprehension of government and to provide information essential to effective use of the right of access to documents granted in Part III of the Bill. However, the publication requirement is deficient insofar as it neglects to compel a mandatory description of the procedures necessary to obtain documents.

The statement of categories of documents has no prescribed form. As a minimum it must be "appropriate for the purpose of assisting members of the public to exercise effectively their rights under Part III."[390] The sufficiency of the form for this purpose must be approved by the responsible minister.

The obligation to publish is subject to an exemption respecting information that, if included in a document, would cause it to be an exempt document.[391] Thus, an agency need not publish information about functions the very existence of which is a confidential matter.[392]

390 Id., s. 6(2).

391 Id., s. 6(4).

392 Explanatory Memorandum, supra note 389, at 3.

This exemption should not reduce the requirement to publish a statement of categories for all documents. Unless information as to the existence of the document would itself cause a document to become an exempt document, it must be included in the published statement. Any other interpretation would frustrate the intention of the Bill and effectively render it impotent. The exemption from publication does not authorize an agency to decide whether to include the document in a statement based on its opinion as to whether the document is exempt. An agency could then exclude the document from the statement, effectively denying access and precluding review, because knowledge of its existence would not be publicly available.

b) Documents Required to be Made Available

Section 7 grants public access to secret law. The disclosure requirement applies to "manuals or other documents containing interpretations, rules, guidelines, practices or precednets" used by agency staff or agency members "in making decisions or recommendations under or for the purposes of an enactment or scheme administered by the agency."[393] The decisions included within its ambit deal with rights, privileges, or benefits to which a person may be entitled, or obligations, penalties or detriments to which he may be subject.

393 Freedom of Information Bill, s. 7(1).

Although the statutory language probably exposes all kinds of secret law, its reach would be more certain if it explicitly included "rules of procedure" and "statements of policy." Omissions may permit government officials to follow a restrictive interpretation, excluding policy and procedural documents from public scrutiny.

If an agency administers a scheme, and the particulars of the scheme are not contained in an enactment, documents setting out its particulars must be disclosed.

Documents that are otherwise published, either by another agency or by a non-agency, are not included in the section. Thus, law reports or tribunal reports that are commercially published would be exempt.[394]

The principal officer of an agency must cause copies of all documents to which the section applies to be made available for inspection and purchase by members of the public. The Bill, though, does not set out the procedures or methods by which this should be effected. Nor is there any mention of the costs to be charged for inspection and copying. These matters may be implemented by regulation. The 1976 Report of the Interdepartmental Committee recommended that charges be based on direct costs for search and duplication,[395] and that a schedule of charges

394 Explanatory Memorandum, supra note 389, at 4.

395 Report of the Interdepartmental Committee (1976), supra note 388, at 83.

applicable to all departments be established. These recommendations were not followed by the Bill, but the broad scope of the regulation power would allow their adoption.

The decision to confer the authority to establish procedures, including costs, on the government and not the agencies is very significant. Besides allowing for flexibility and an individualized approach to procedure based on the exigencies of each agency, it places political responsibility for the implementation of the critical administrative details that so profoundly influence the exercise of substantive rights directly on the government. Centralized government accountability should reduce the possibilities for administrative abuses similar to those experienced in the United States, where each agency was responsible for completing the practical details of The Freedom of Information Act. A government wishing to prevent criticism will implement responsible procedures and costs by regulation. Whether this was the intention of the legislation is unclear from the background papers, but it is a consequence that should promote an effective right of access.

Information concerning the availability of the secret law is disclosed by publication of a statement in the Gazette, specifying the documents of which copies are available and where they may be inspected and purchased. The statement may be in the form of an index. Periodic statements must be published at annual or lesser intervals to maintain the currency of the statement.[396]

396 Freedom of Information Bill, s. 7(2).

If a manual or other document contains exempt matter, the document need not be made available for inspection and copying. However, "if practicable," the document should be modified to delete the exempt matter so that it may be available in the ordinary manner.[397] This mechanism allows for a balance between the general legislative philosophy of public access and the protection of the public interests in non-disclosure recognized by Part IV of the Bill. The Explanatory Memorandum illustrated the operation of the subsection by the following example:

> ... in the case of an agency responsible for making grants of money to organizations, a manual may describe both the conditions that an organization must comply with to be eligible for a grant and instructions on checks to be made on the activities of the organization to ensure that the money is properly applied. To disclose the latter matter may well defeat the purpose of making these checks. In such a case the sub-clause would require the manual to be re-written to delete this latter material. [398]

This outlines a distinction identical to that followed in the American jurisprudence and legislative history between manuals pertaining to "administrative matters rather than law enforcement matters."[399]

The Australian Bill does appear to have one serious flaw. If a document containing secret law is exempt, it need not be included in the Gazette

397 Id., s. 7(4).

398 Explanatory Memorandum, supra note 389, at 4.

399 S. Rep. No. 813, supra note 361, at 2; Attorney-General's Memorandum (1975), supra note 363, at 22.

statement. Whether it will be indexed then depends on a government opinion that the document is exempt. However, if the government errs or prefers to conceal the document, its omission from the published statement prevents people from discovering its existence. Consequently all documents should be indexed, including exempt documents, if this can be done without disclosing the exempt information.

The Bill provides a sanction for failure to comply with the requirement to make a document available and include it in a Gazette statement. A person will not be "subject to any prejudice" by reason of the application of a rule, guideline or practice contained in a document which an agency failed to make available in accordance with section 7, if the person was unaware of it and he "could lawfully have avoided the prejudice had he been aware of that rule, guideline or practice."[400] A person cannot be put in a worse position through ignorance of the document than he would have been in had he known of the document.[401] This sanction is substantially weaker than its American counterpart, which prevents an agency from relying on a document as precedent if there has been failure to properly index the document and make it available.

Several characteristics of the Bill should be noted. All interpretative documents must be made available in the same manner. There is no distinction between classes of interpretative rules, as in the American

400 Freedom of Information Bill, s. 8.

401 Explanatory Memorandum, supra note 389, at 5.

Freedom of Information Act. Although the distinction there was established to select those rules deserving wider availability through publication, confusion has ensued because the character of the rules has not been defined in the statute and has resisted judicial clarifications. The Australian approach avoids this problem by not distinguishing between kinds of rules. Although the Bill does not compel publication of any rules, this is not a serious deficiency because the rules are otherwise available.

That administrative and procedural details are to be established by regulation by the government and not left to the vagaries of agency discretion is commendable for reasons already discussed.

Finally, like the American statute, the Bill recognizes that the availability of indexes or similar documents is essential to the effective assertion of the right of access.

3. Nova Scotia

Although the Nova Scotia Freedom of Information Act[402] is a very cautious statute, conferring limited access falling far below the

402 S.N.S. 1977, c. 10. The Act was proclaimed on October 11, 1977 and declared in force on November 1, 1977.

standards established by the American and Australian statutes,[403] it does compel the disclosure of secret law. In fact, documents and information concerning secret law are almost the only matters to which there is a clear right of access. That a generally restrictive freedom of information statute exposes secret law to public scrutiny offers testimony of the widely shared view that its disclosure is just and that it is not inconsistent either with our constitutional principles or our parliamentary traditions.

403 The Act does not confer a general right of access, but only grants access to defined categories of information. There is no independent review of decisions refusing access. Final appeal is to the provincial legislature. A person wishing to obtain access must "identify ... precisely" the desired materials. In the United States, a requestor must "reasonably describe" records. Under the Australian Bill, a person wishing to obtain access to a document must provide such information as is "reasonably necessary" to enable identification of the document. Moreover, the Nova Scotia statute does not mandate the existence of an index to permit the required precise identification. There is also a drafting flaw which will produce confusion. A person must "identify the material precisely". Yet the term "material" is not defined. The terms "information" and "record" are defined though. Thus, the statute requires precise identification but does not define or explain what must be identified. Is it the information or the form in which the information is maintained, or must both be identified? The answer is not clear since terms were available to describe these possible interpretations, and those terms were not used. This illustrates the critical necessity of careful drafting, particularly when the exercise of the statutory right may rest on the meaning of a word or phrase.

a) Definitions

The Act is concerned with granting a right of "access" to "information" from a "department."[404] "Access" is defined to mean "either the opportunity to examine an original record or the provision of a copy, at the option of the government."[405] Conferring a discretion to decide whether a person may have a copy of the document allows the government power to reduce the effectiveness of the right of access. Essentially it permits the government to force an individual to peruse the materials at the government office. If a document is complex or voluminous, an opportunity to merely examine it will be insufficient to facilitate an adequate comprehension or retention of matters that one may wish to use in subsequent interaction with a government department. The right to read a staff manual concerning conditions of entitlement to benefit for which one will apply is certainly a less meaningful right than having a right to possess a copy of the manual from the initial stages of application through to the final decision. This definition of "access" then is replete with opportunities for the denial of effective and meaningful access.

404 Section 1(d) defines a "department" to be "any department, board, commission, foundation, agency, association, or other body of persons ... all the members of which ... (i) are appointed by Act of the legislature or by Order of the Governor in Council; or (ii) if not so appointed ... are public officers or servants of the Crown ... or are directly or indirectly, responsible to the Crown". This definition includes an administrative tribunal.

405 Freedom of Information Act, s. 1(a).

The other definitions are unobjectionable. "Information" is broadly defined as "information in any form including information that is written, photographed, recorded or stored in any manner whatsoever and on file or in the possession or under the control of a department ..."[406]

b) The Right of Access

The right to access extends to ten defined categories of information:

1) organization of a department;

2) administrative staff manuals and instructions to staff that affect a member of the public;

3) rules of procedures;

4) descriptions of forms available or places at which forms may be obtained;

5) statements of general policy or interpretations of general applicability formulated and adopted by a department;

6) final decisions of administrative tribunals;

7) personal information contained in files pertaining to the person making the request;

8) the annual report and regulations of a department;

9) programs and policies of a department; and

10) each amendment, revision or repeal of the foregoing. [407]

406 Freedom of Information Act, s. 1(f).

407 Id., s. 3.

The first five categories of information are taken from the United States Freedom of Information Act and will raise similar questions of interpretation.

Administrative staff manuals and instructions to staff are to be available if they "affect a member of the public." A literal reading would disclose manuals and instructions relating to law enforcement techniques which, if known in advance, could possibly impede government measures. The exemptions established in section 4 do not expressly exempt this information. The category that addresses the law enforcement issue excludes "information which ... would be likely to disclose information obtained or prepared during the conduct of an investigation concerning alleged violations of any enactment or the administration of justice."[408] A court may interpret manuals and instructions to be "information ... prepared during the conduct of an investigation" but this is a significant extension beyond the meaning of the words. This difficulty illustrates the necessity of careful drafting so that the public interest in efficient law enforcement will be clearly protected.

Access is granted to information respecting "statements of general policy or interpretations of general applicability formulated and adopted by a department," and "programs and policies of a department." The interaction of these two categories seems capable of producing much

408 Id., s. 4(c).

confusion. The meaning of a "statement of general policy" is not clear. It has thus far defied clear definition in the United States. However, one can surmise that it is intended to refer to a policy that is to be applied in a consistent manner to cases or the performance of department functions. Yet the same matter would be disclosed by the grant of access to "policies of a department," a category sufficiently general so as to include the earlier class of information, unless of course there is a distinction between the two. The distinction, though, would be of no practical significance. Both categories of information are to be treated in precisely the same manner. All policies, general and otherwise, are subject to the right of access.

In the United States, there has been controversy whether the publication requirement in 552(a)(1)(C) extends to policies articulated and adopted in written decisions.[409] The Nova Scotia Act solves the question by granting access to final decisions of an administrative tribunal. To the extent that a decision-maker is not an administrative tribunal, however, this remains an issue. The confusion is increased by the failure to define the meaning of "administrative tribunal." Whether it refers to all boards, agencies, commissions and other bodies created by the Nova Scotia government is unclear, although even the modest disclosure policy underlying this statute should lend support to this interpretation.

409 Davis, supra note 304, at 768-770.

"Interpretations of general applicability formulated and adopted by a department" must be made available. This category raises similar questions of interpretation. The meaning of "interpretations of general applicability" is uncertain, although it is probably intended to include interpretations of substantive and procedural legislative provisions that are to have a precedential significance in the exercise of departmental functions, particularly in the context of decisions. Whether the category applies to interpretations formulated and adopted in decisions is an issue.

The use of vague language and the resultant confusion are certainly problems in the statute, but they are not deficiencies of a nature that will undermine the fundamental right of access. Judicial interpretation may clarify many of the perplexing areas in the legislation. Certain procedural aspects of the Act, though, deserve serious criticism. There is no index requirement. This omission alone may render the right of access almost meaningless, particularly in view of the necessity of an individual being able to identify "precisely" the materials sought. The statute demands identification of matter in detail without providing means to obtain the requisite knowledge. An index requirement may be essential to effective operation of the Act.[410] The Act does not necessarily exclude it as a possible requirement. The power of the Governor in Council to make regulations respecting "such matters or

410 S. Rep. No. 813, supra note 361, at 7; Attorney-General's Memorandum (1975), supra note 363, at 18.

things as are necessary to carry out the intent and purpose of the Act" may be used to require indexes.

The Governor in Council may also make regulations establishing procedures and "prescribing fees or charges to be made for requests [and] access ...."[411] As discussed in the context of the Australian Bill, important advantages result from centralizing responsibility in a politically accountable body. The potential advantages are mitigated by the fact that the regulations have no effect on procedures, fees or charges currently in existence. Section 14 provides that "[N]othing in [the Freedom of Information Act] shall in any way alter procedures, fees or charges now provided in any enactment for obtaining access or copies of information...."[412] Consequently, any department or administrative body that has adopted onerous procedures or excessive rates for photocopying pursuant to a statute, may have averted The Freedom of Information Act through effectively discouraging persons from resorting to its use.

D. Summary

In the preceding discussion of the other jurisdictions, attention has been drawn to laudable aspects of the various legislative schemes and

411 Freedom of Information Act, s. 18(1)(d).

412 Id., s. 15(1)(a).

to areas which are problematic, either due to poor drafting or the deliberate choice of the enacting government. A problem of the latter category is the failure of the Nova Scotia statute to require an index. At this juncture, it is appropriate to convert the disparate comments into a list of elements that should be included in a freedom of information scheme to expose secret law in Ontario.

1) Secret law should be published. In cases in which the anticipated demand and attendant costs do not justify the expense of publication, it should be made available for inspection and copying.

2) Secret law should be defined in as wide a manner as possible. Any document setting out a procedure or containing a rule, policy, precedent, guideline, instruction or interpretation should be subject to public scrutiny. The operative language should be clear and not create distinctions between kinds of policies or interpretations.

3) A description of the functions, organization and structure of ministries and administrative boards should be published or otherwise made available. It should explain any scheme of delegation of decision-making powers within a tribunal or ministry. It should also describe how requests for information under the statute are to be made.

4) If secret law is not published, it should be available for inspection and copying at public and university libraries and at all local and district offices of the appropriate ministry throughout the province.

5) Fees for search, identification and photocopying should be minimal.

6) Procedures for inspection at government offices should be simple and readily comprehensible.

7) Fees and procedures should be established by regulations made by the Lieutenant Governor in Council and not left to the unfettered discretion of individual ministries and tribunals. This will focus political responsibility on the government for the effective implementation of the statutory right.

8) Documents within the definition of secret law should be indexed in a comprehensible manner by the ministry or tribunal that has devised them. Indexes should be either published or distributed to public and university libraries and to all local and district offices of the appropriate ministry throughout the province.

9) A requirement to publish or make available secret law should not force disclosure of sensitive information otherwise protected by statute from public scrutiny. Both the American Freedom of Information Act and the Australian Freedom of Information Bill, 1978 provide that the duties to expose secret law are subject to statutory exemptions. If a freedom of information statute is enacted in Ontario, it should require that all documents, including exempt documents, be listed in the index. Otherwise the ministry or tribunal will be able to deny access to documents by excluding them from the index.

10) A provision allowing the deletion of exempt information from documents should be enacted. A supplementary provision should accompany this, requiring that documents be prepared in a manner that will permit segregation of exempt material from the rest.

11) A person should not be adversely affected by the application of a rule, policy, directive, guideline or precedent contained in any form of secret law not properly indexed or made available unless he has had actual and timely knowledge of the rule, policy or directive in issue. A decision made by the application of secret law not properly indexed or accessible should be subject to review on that basis alone, whether the decision was made by a tribunal or a government official within a ministry. The complete costs of review on this basis should be borne by the government.

CHAPTER IX

POLICY-MAKING: ONTARIO MILK MARKETING BOARD

Chapter III noted that many administrative boards and tribunals do not make policy independent of hearing decisions. An exception to this is the Ontario Milk Marketing Board. Broad policy-making responsibilities have been conferred upon the Board.[413] This chapter will briefly describe how this responsibility has been exercised in three areas -- quotas, price, transportation.

A. Quota Policy

Upon its formation, the Board sought to establish a comprehensive Group I (fluid milk) quota policy. Eighteen months of study and consultation produced the "Group I Pool Quota Policy" applying to all Grade A milk producers receiving the same pool price for milk shipped within their fluid milk quotas.

413 R.R.O. 1970, Reg. 595, s. 5.

A paper[414] by Mr. Hurd, General Manager of the Board, describes the policy:

> In brief, the Group I Pool quota policy established a base period upon which the Board's initially allotted quotas were issued to Grade A shippers. At the time of this allotment, all former quotas became null and void. The Group I Pool Quota Policy, established the terms of entry to the Group I Pool and the terms associated with quota transfers. It established the conditions with respect to the maintenance of a quota, and how the Board would make quota adjustments as these became necessary. Under the system, Group I Pool quotas were made fully negotiable between producers, subject to the Board's policies and approval. The quota indicates to the producer what his share of the top price market will be. Milk produced over the Group I Pool quota is sold by the Board for industrial milk purposes.

After creating the Group I Pool, the Board developed the Group II Pool for industrial milk producers. It established a centralized selling system under which milk is priced to processing plants according to classes referable to final product. The returns are pooled to the producer.

To be effective, the substantial changes effected by the quota policies required the acceptance of producers of both fluid and industrial milk. Therefore the Board sought to ensure a thorough and meaningful consultative process. After the Board developed a basic framework for these policies, it was presented for comment to the 54 district and county Milk Committees representing the milk producers of Ontario.

414 Lorne Hurd, "Functions and Responsibilities of the Ontario Milk Marketing Board" (Presented to a seminar, School of Agricultural Economics and Extension Education, University of Guelph, February 13, 1975).

Representatives of milk processors and transporters made informal submissions. The Board also conferred with the Milk Commission and special interest groups, such as the Channel Island Milk Producers.

Quota policies are communicated in a "Quota Policies" brochure, distributed to milk producers. During a quota period, usually one year, the policies in the current brochure apply, unless the Board amends them to meet unforeseen circumstances. The producers are advised that the Board may change its policies. Since the Board administers the National Supply Management Program for industrial milk within Ontario, it must alter its policies when the provincial allotment of industrial milk is changed by the Canadian Milk Supply Management Committee.[415] At the conclusion of a quota period, a new brochure of quota policies will reveal changes in quota policy that have occurred.

The quota policies incorporate an "appeal" procedure for producers dissatisfied with their quota allotment. Requests for special consideration are initially screened by the Quota Committee which makes a recommendation to the Board for its decison. To assist the Quota Committee, the Board has developed a set of guidelines concerning the administration of quota policy to ensure consistent treatment. For example, a producer's quota may be reduced if he has failed to maintain

415 The Committee includes representatives from each province. The Ontario contingent includes representatives from both the Milk Commission and the Ontario Milk Marketing Board.

his quota during the year. The producer may contend that the quota should not be lowered because he suffered a disaster beyond his control. Whether his excuse is accepted may rest on a policy as interpreted by certain guidelines which list diseases that will allow a producer to plead catastrophe as a mitigating factor.

The Board provides three forums for formal input into quota and other policies. Every autumn the Board conducts a conference at Geneva Park, Ontario, to introduce new policies and hear grievances from representatives of district and county Milk Committees. In the spring the Board chairman and necessary staff personnel travel to thirteen regional meetings of Milk Committee members.[416] The third opportunity for formal participation is during the annual meeting in Toronto. On occasion, the Board has convened special provincial conferences to consider the views of industry representatives about particular issues.

B. Price Policy

The Milk Marketing Board buys all milk sold by Ontario milk producers and sells it to dairies and other processors. Therefore it is responsible for marketing the supply of milk and for the return that

416 Although there are 12 milk producer regions, there are 13 meetings because Northern Ontario is divided into two regions. Meetings are held at North Bay and Thunder Bay.

milk producers receive. The return is distributed according to a price pool system under which the total revenue of a milk pool area is divided among producers according to their respective shares of the market or quota. The Board has no control over retail milk prices. However it is authorized to establish the selling price of raw milk to the processors.[417] Prices are adjusted periodically as circumstances change.

While developing its quota policy, the Board was also establishing a policy for pricing raw milk. After consultation with its economists and those within the Ministry of Agriculture and Food, the Board decided to adopt an economic formula for pricing milk. This method has previously been used in parts of Ontario and was chosen instead of the cost-of-production type formula employed by the federal government. Five factors constitute the fluid milk price formula. Each of the factors is weighed in relation to the base period (1970-72) index values and base period price.[418] The factors that make up the pricing formula are: the farm input price index for eastern Canada, the feed price index for eastern Canada, average weekly earnings / Ontario industrial composite, the general wholesale price index, and fluid milk sales expressed as a percentage of total milk sales in Ontario.

417 R.R.O. 1970, Reg. 595, s. 6(a).

418 Ontario Milk Marketing Board, Pricing Fluid Milk at the Farm Level, Tables 1 and 2.

The Board has been criticized for its policy-making in this area:

> The Board's record in explaining its actions to the public has not, however, been perfect. An example of insufficient explanation is the procedure the Board used in developing a new base price for its pricing formula. The new base price was not brought forward for public scrutiny, nor were there discussions in advance of its utilization as part of the rationale for a price increase. 419

When confronted with this criticism, the Board indicated that extensive consultation with consumer groups and the various industry Advisory Committees did occur and alleged that the authors of this report did not sufficiently investigate this issue.

The Board does have a record of public consultation for all price changes that have been implemented since adopting the price formula. Although price changes can be calculated in a straightforward manner by using the economic formula, the Board sometimes sets the price for fluid milk at a substantially different level from that indicated by the formula. The Board may be influenced by an unsettled economy or the negative effect of a large price increase on the market.

When the Board wishes to effect a price increase, it gives notice to the Ontario Dairy Council, an organization of dairy processors, and to the Consumer Association of Canada, Ontario Branch. Both groups are

419 Broadwith, Hughes and Associates, "The Ontario Milk Marketing Board: An Economic Analysis" in Government Regulation, supra note 4.

invited to make informal representations to the Board. Discussions begin within the Advisory Committee for Milk. The Committee is chaired by the Chairman of the Milk Commission of Ontario and includes eight members of the Marketing Board and eight members representing the processors and distributors. The views of the processor members of the Advisory Committee are eventually considered by the Ontario Milk Marketing Board. Further meetings with the Marketing Board may be necessary. The Board communicates its decision about the amount and timing of the price change to the Ontario Dairy Council and files a regulation. The Ontario Dairy Council may then decide to appeal the amount of the increase to the Farm Products Appeal Tribunal.[420] Although any person has the right to appeal, the usual appellant has been the Ontario Dairy Council, as the trade organization representing the processors. Since the price of raw milk accounts for more than half of the retail price of fluid milk, the processors have a vital interest in a price change.

There are no restrictions on the frequency with which the Board may initiate price changes. As a general policy, the Board minimizes the number of these changes in order to avoid consequential changes at the retail level. In furtherance of this objective, the Board has followed the practice of allowing the existing price to lag behind that

420 Until February 1, 1979, appeals were considered by the Milk Commission of Ontario. This was altered by The Ministry of Agriculture and Food Statute Law Amendment Act, 1978.

indicated by the formula for a period of time. It then establishes a new price equivalent to double the difference between the existing price and the formula price. This procedure anticipates that the actual price will exceed the formula price half the time and be below it half the time.

The Consumers Association of Canada, Ontario Branch, receives statistical data justifying price increases from the Board. Its representatives suggested that the data is not always useful in the technical form in which it is delivered. The statistics are only helpful when the rationalization of the policy behind them is clearly articulated so that the reason for a change may be ascertained and evaluated. Although the Association is invited to participate in meetings discussing price changes, it feels helpless when it comes to participating in policy-making.

The industry Advisory Committees appear to be useful means to gather the views of the milk industry for presentation to the Milk Marketing Board. However, their legislative purpose is restricted to the industry, and does not encompass an obligation to consider the consumer interest.[421]

In addition to considering price increases, the Advisory Committee for Milk reviews other policies that affect milk processors in its eight to ten meetings a year. For example, the Committee develops milk quality

421 O. Reg. 92/76, s. 9, s. 10; R.R.O. 1970, Reg. 595, s. 9, s. 10.

standards and presents them to the Milk Industry Section of the Ministry of Agriculture and Food with the hope of implementation. The Advisory Committee for Cheese meets three or four times a year to develop policies about such matters as operation of the Belleville Cheese Exchange, cheese exports, and formulae for the pricing of different types of cheese. This Committee includes representation from the cheese manufacturers, cheese processors and cheese buyers. Representatives of the Ontario Dairy Council have indicated that both the Milk and Cheese Advisory Committees provide opportunity for the exchange of ideas and for posturing since the Ontario government acts a chairman. Although the government representative is a welcome addition when the various Committee members are lobbying for government changes, his presence is perceived as an impediment to candid discussion. Consequently, various informal in-house committees set up by the Marketing Board and Ontario Dairy Council often produce more substantive policy decisions affecting the processor than the formal Advisory Committees. Policy-making, then, occurs in the forum believed to be most effective by the affected parties.

C. Transportation Policy

Each milk transporter is appointed as an agent of the Board authorized to transport milk on set routes.[422] The Board uses a transport rate

422 O. Reg. 193/78, s. 3.

formula to determine payments to transporters for hauling bulk milk. The transporter is paid by the Board according to a rate which results from applying the formula to his individual operations. The formula was designed both to determine a fair rate and to encourage efficient operation by individual transporters and throughout the entire system. While the transporters are paid by the Board at the formula rates, the total cost is pooled. Each producer in a pool is assessed a uniform charge for the amount of milk shipped.

The Bulk Milk Transport Rate Formula was developed by a Rate Formula Committee consisting of representatives of the Board and the Ontario Milk Transport Association, representing private transporters and representatives of cooperative and processor transporters. After two years of negotiations, the Committee made its recommendations to the Board and the policy was approved in 1970. The formula consists of allowances for transporters' fixed costs, labour, variable operating costs and overhead, administration and management, with provision for adjustments as conditions change. The formula is then applied to the rate which is determined from the volume of milk hauled, route mileage, and time involved.

The Rate Formula Committee strives to keep the rates consistent with current conditions by a quarterly review of the formula cost allowances. It reviews fixed costs in the first quarter; overhead, administration and management in the second; variable operating costs in the third; and labour in the fourth. The Committee also advances policy proposals

about other matters, such as payments for rejected milk transportation and payments for inter-plant milk movement. These policies, including the Bulk Milk Transport Rate, are thoroughly explained in two brochures.[423] The brochures explain why the rate formula was selected in preference to alternative methods of setting bulk milk transport rates.

Transporters may participate in policy-making through the Advisory Committee on Transportation of Milk. The Committee is composed of eight Board members and eight members representing the transporters. In addition to rates, the Committee considers other policy matters such as special charges to producers for daily pick-up and milk pick-up service requirements. Both the Milk Transport Association and Board members, however, believe that this Committee has not been nearly as effective as more informal committees. In recent years, the Committee has only met annually.

Although quota, price and transportation policies constitute the bulk of the policy-making function of the Ontario Milk Marketing Board, it is concerned with myriad other issues. The Board has a substantial research department and is constantly exploring new areas of policy concern. It also acts as a political lobby on behalf of milk producers attempting to influence federal policy concerning the dairy industry.

423 Ontario Milk Marketing Board, How Ontario Producers Pay For Bulk Milk Haulage and What Milk Transportation is About.

As a representative of provincial milk producers in the Dairy Farmers of Canada, the national federation of milk producer organizations, the Board was directly involved in the negotiations about the pricing formula for industrial milk and is now concerned with producer subsidy levels. The Board has also been instrumental in Ontario dairy policy formulation, including the introduction of government programs providing IMPIP[424] grants. It is currently holding discussions with provincial authorities on herd health, milk recording and dairy farm labour programs.

424 Industrial Milk Production Incentive Program.

CHAPTER X

CONCLUSIONS AND SOME QUESTIONS

The practices of the various administrative decision-makers present persuasive evidence that freedom of information legislation is necessary to improve public knowledge and instill trust in the administrative process. Although many of the decision-makers surveyed have adopted laudable practices of accessibility and publicity, others have not for reasons that are often vague or not readily comprehensible. This failure to articulate underlying policies in a clear and thoughtful manner suggests that, in many cases, the reason for secrecy is often inertia or the consequence of entrenched and unchallenged practice, rather than intentional concealment. For this reason, legislation is essential. As well, American experience before the 1974 amendments to The Freedom of Information Act suggests that only clear guidelines will overcome the protective proclivities of governmental custodians of information.

However some confidential practices are not the product of this confusion and recalcitrance. Several decision-makers have adopted practices intended to protect various interests from anticipated harmful effects of the disclosure of information. Identifiable personal data and certain sensitive business information may merit this consideration. Protective treatment has been afforded to them by the freedom of

information legislation of other jurisdictions. The province of Ontario can similarly develop a legislative scheme which would guard them from disclosure. This may be achieved by adopting a freedom of information statute which grants public access to selected categories of information, and by excluding from that list the kinds of sensitive information which the legislature decides should not be disclosed. An alternative mechanism is found in the American and Australian statutes, which confer a public right of access to all information subject to certain specified exemptions designed to protect the interests recognized by the legislature. This affords maximum recognition of the public interest in information access without being destructive of equally important public interests in the confidentiality of certain kinds of information.

The exemptions will be the core of such a freedom of information statute. They must be drafted with consummate care and foresight so that no unintended disclosure of sensitive information or inadvertent concealment will apparently be sanctioned by legislative authority. Certain technical and procedural aspects of the statute will merit careful consideration. A statute should confront a variety of questions including: the appropriate appeal mechanism; the remedies available, including the possibility of administrative sanctions; time limits for compliance with a request; in camera inspection of documents by the appellate body; provision for initial internal review of decisions; and the treatment of documents, including both exempt and non-exempt information. Although the resolution of these issues is beyond the

purview of this study, they are mentioned here to emphasize that if effective freedom of information legislation is indeed desirable, it must be comprehensive. Omission of any one of these details may substantially weaken a statute.

Thus far, the discussion has not centred on the administrative decision-makers or the administrative process. The question of general access to information in the control of administrative decision-makers by members of the public not involved in an administrative proceeding as a party or intervenor raises the same problems respecting access that arise in other operations of the government. Consequently, freedom of information legislation can apply to administrative decision-makers, including boards or tribunals, in the same manner that it may affect ministries of the Ontario government. When, however, the issue is considered in the context of a request for information by a person affected by a decision of an administrative decision-maker, it raises difficult questions unique to the administrative process.

If a freedom of information statute created a general statutory right of access to information, a person participating in a decision would be entitled to request information from a board or tribunal or a ministry of the Ontario government. One can readily imagine circumstances in which this would be desirable. If one was opposed by the Ontario government in a formal hearing before a board, or ever subject to an administrative decision, it would be very helpful to possess any government information that related to the dispute, especially before

the hearing. Many statutes do afford limited disclosure of documentary evidence to a person engaged in proceedings with the government prior to the hearing. This pre-hearing disclosure, however, includes only evidence that will be adduced at the hearing. It does not compel disclosure of all information relating to the issue. If a government investigation disclosed information favourable to the person or a statement tending to reveal inconsistency, this information would be very useful. In almost all cases, the source of such information would be the relevant ministry of the Ontario government, and not the board or tribunal responsible for deciding the dispute. This follows from the general nature of most of the administrative boards and tribunals in Ontario discussed in Chapter III. Since, generally, they are arbiters of disputes without investigative or prosecutorial responsibilities, they would not be a source from which a party would wish to seek information. It is from the appropriate ministry that a party would request a document under a freedom of information scheme, because the ministry would have conducted the investigation and would be the opposing party at the hearing. There are exceptions to this. The Criminal Injuries Compensation Board does undertake investigations on its own initiative. If a statutory right of access was provided, a party appearing before it would certainly exercise it and request investigative reports before the commencement of the hearing.

It is important to understand the consequences of affording a right of access to a party by freedom of information legislation. Essentially, it confers a unilateral right of discovery on a person involved in

administrative litigation with the Ontario government. Among the boards and tribunals surveyed, only the Land Compensation Board currently has discovery procedures. Several boards conduct pre-hearing meetings for the purpose of arranging procedural details of the hearing, but not to exchange information.[425] Whether discovery procedures should be introduced into the administrative process is a question beyond the terms of reference of this study. That this may be effected by a freedom of information statute, however, must be appreciated.

This has been a controversial issue in the United States.[426] The question has arisen in the context of a request for a document from the agency responsible for the hearing. Unlike most tribunals in Ontario, the major federal independent regulatory agencies in the United States combine hearing functions with investigative and prosecutorial duties.

425 The Ontario Energy Board has conducted public pre-hearing meetings to settle procedures for Hydro References. Various forms of limited pre-hearing meetings have been held by the Ontario Highway Transport Board, the Environmental Assessment Board and the Assessment Review Court.

426 Note, "Federal Freedom of Information Act as an Aid to Discovery" (1968) 54 Iowa L.R. 141; W.H. Adams, "Freedom of Information Act and Pre-Trial Discovery" (1969) 43 Mil. L.R. 1; M.S. Wallace, "Discovery of Government Documents and the Official Information Privilege" (1976) 76 Col. L.R. 142; S.C. Goldberg and R.W. Wein, "Facilitating Discovery in Civil Securities Actions: The 1975 Amendments to the Freedom of Information Act of 1966", (1975) 21 N.Y.L.F. 277; T.S. McGonegle, "Backdooring the NLRB: Use and Abuse of the Amended Freedom of Information Act for Administrative Discovery", (1976) 8 Loyola U.L.J. (Chicago) 145; D.B. Garvey, "Pre-hearing Discovery in NLRB Proceedings", (1975) 26 Lab. L.J. 710; C.E. Stewart and C.D. Ward, "FTC Discovery: Depositions, The Freedom of Information Act and Confidential Submissions", (1968) 37 ABA Antitrust L.J. 248.

Therefore, discovery from them would be especially advantageous. Since many American agencies already have forms of discovery,[427] the issue has been whether The Freedom of Information Act may be used to supplement existing procedures. The courts have held that the fact that a person is a litigant does not diminish or augment his right to information under The Freedom of Information Act. His right is the same as any other member of the public.[428] The courts, however, have resolutely prevented The Freedom of Information Act from being employed to facilitate discovery from the National Labour Relations Board, an agency that has chosen not to have any discovery procedures at all.[429]

Related to the general question as to whether a person involved in an administrative hearing should be granted a discovery right, are important procedural questions. If there is a right of access, will a request for documents stay proceedings that are pending before an administrative tribunal? If a hearing is not postponed until after a decision whether a requestor is entitled to the information, he may

427 Note, "Discovery in Federal Administrative Proceedings", (1964) 16 Stan. L. Rev. 1035.

428 Deering Milliken, Inc. v. NLRB, 548 F. 2d 1131, at 1134-1135 (C.A. 4th Cir., 1977); Climax Molybdenum Co. v. NLRB, 407 F. Supp. 208, at 209 (D. Colo., 1975), aff'd 539 F. 2d 63 (C.A. 10, 1976).

429 Title Guarantee Co. v. NLRB, 534 F. 2d 484, at 491-492 (C.A. 2nd Cir.), certiorari denied, 421 U.S. 834 (1976); New England Medical Center Hospital v. NLRB, 548 F. 2d 377 (C.A. 1st Cir., 1976). There is a helpful analysis of the cases in "Backdooring the NLRB: Use and Abuse of the Amended Freedom of Information Act for Administrative Discovery", supra note 426.

receive it too late to use it. Yet, to allow a person to exercise his rights under a freedom of information scheme may invite individuals to institute requests under the statute to delay proceedings. Of course, the cost of making requests may deter them for this purpose. Moreover, the possibility that parties may resort to such delaying tactics may be a worthwhile risk when balanced with the advantages of freedom of information legislation. A choice must be made on the question of whether an application for documents will delay a hearing. Each side of the issue bears costs. If postponement is not allowed, the right of access may be an empty one. If a request for documents operates to hold the proceedings in abeyance pending determination of the information issue, there is a potential for abuse.

More questions remain. Allowing a party to request documents through a freedom of information statute confers a discovery right on a party when he is engaged in a dispute with the government of Ontario. If the tribunal is the arbiter of a controversy between two private parties, there is currently no equivalent discovery right possessed by either party. Thus freedom of information legislation will produce an anomalous situation in which a form of pre-hearing access or discovery is afforded only when a person is opposed by the Ontario government, but under no other circumstances. That an inconsistency would ensue is not in itself a problem unless the irregularity is of consequence. In one context, the anomaly is insignificant. When there is administrative litigation with the Ontario government, a ministry does not require a form of discovery because it possesses extensive powers of entry and investigation

that allow it to gather the necessary information. Granting a right to documents to the opposing party would in a sense redress a present imbalance. This argument, however, does not address the fact that private parties would not have a similar right to pre-hearing disclosure in proceedings before a board or tribunal.

The issue of administrative discovery and ancillary procedural questions apply to administrative decision-makers that are not discrete boards or tribunals. These decision-makers, such as the Registrar of Motor Vehicle Dealers and Salesmen and the Director of the Provincial Benefits Branch, make decisions without conducting a formal hearing. It is only when a person is aggrieved by a decision that a formal hearing is held by the appropriate appellate tribunal. The initial decision is intended to be simple, expeditious and informal. Whatever its form, freedom of information legislation should not frustrate this intention. If a request for information automatically stays a decision pending resolution of the freedom of information issue, the decision-making process will be seriously disrupted. Moreover, it is likely that individuals would make requests before every decision to secure any information that may be useful in supporting a case. In this context, a solution may be to allow a request for information to postpone a decision only when the decision-maker has not decided in favour of the applicant. If a Registrar or a Director grants an application, there is no reason why the decision should be delayed. Postponement is critical only when the applicant may lose his case.

Chapters VII and VIII recommended that decisions and existing forms of secret law be published or made available. This suggestion poses no dangers to the process of decision-making. However costs will attend the adoption of this policy, depending on the extent and method of distribution. Secret law should be available for the purposes of photocopying at all of the various local and district offices of the relevant ministries throughout the province. The availability of tribunal decisions should depend on the anticipated demand and the volume of decisions. For certain boards and tribunals, minimal interest will not justify publication, but would suggest distribution to libraries and ministry offices. When there is public interest or if the decisions concern significant issues, they should be published. If the volume of decisions does not permit their publication, judicious selection of the important decisions can be made, allowing the remainder to be available for photocopying. In order for the decisions to be truly accessible to the public, they must be indexed in a rational manner, preferably according to subject matter and issue.

The application of freedom of information legislation to the administrative process will bear concomitant costs. Publication or even limited distribution of documents, decisions and manuals will incur very concrete expenses. Allocation of human resources to organize materials and design procedures will result in costs that are quantified less readily. Reasonable user charges for search and photocopying can partially defray the expense. Inevitably, a portion of the costs must fall on the general public. Although certain benefits of freedom of

information legislation are intangible, it is arguable that the resulting advantages, particularly in this context, outweigh the costs. Public comprehension of an area of the government that is only dimly perceived will be heightened. Various policies directly affecting members of the public that are now at best elusive will finally be accessible. Such exposure will permit the informed public evaluation critical to true political accountability and democracy.

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